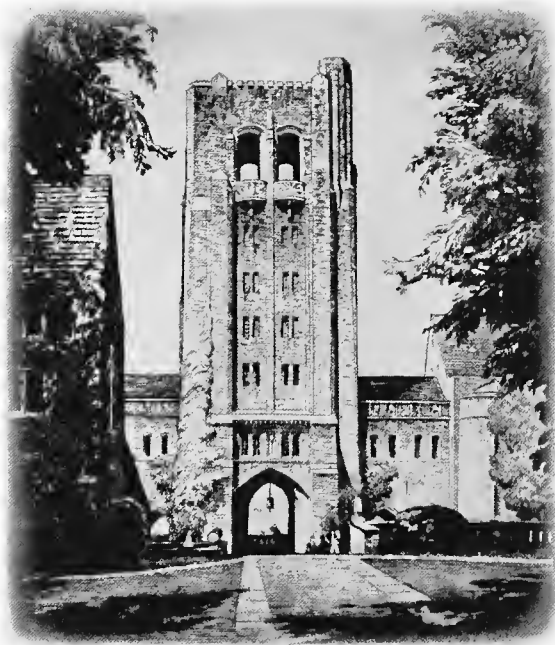


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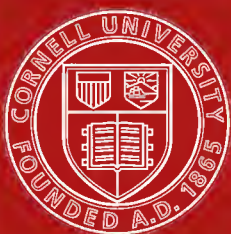
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SELECTIONS

ON

THE ELEMENTS OF JURISPRUDENCE

COMPILED BY

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NOTE.

This compilation has been prepared primarily with reference to the needs of students beginning the study of law in the School of Law of Columbia University. Its purpose is to enable the student to participate in and to follow intelligently the discussions of the class room.

Columbia University, New York, September 1, 1896.

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SELECTIONS

ON

THE ELEMENTS OF JURISPRUDENCE.

CHAPTER 1.

THE NATURE OF LAW.

- § 1. Law and Fact.
- 2. Laws of Nature, and Laws of Man.
- 3. Law and Morality.
- 4. Command and Custom.
- 5. General and Particular Commands.

§ 1. Law and Fact.

*From Thayer's "Law and Fact in Jury Trials," 4 Harvard Law Review, 150-153.**

Let us now try to find some definition of "fact," and a just discrimination between fact and law. To define fact is, indeed, a "perylous chose," as they say in the Year Books; and some persons think it unnecessary.¹ It is certainly true that the term is widely

* It is proper to say that the matter here quoted will appear in a volume entitled "A Preliminary Treatise on Evidence," now in course of publication by Messrs. Little, Brown & Co., of Boston. It is here inserted by permission of the writer and the publishers.

¹ For instance, a very able writer in the Solicitors' Journal (volume 20, p. 869). "A definition," he remarks, "is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition, therefore, is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it; and, whereas it is unnecessary to define, it is also dangerous, because an incorrect definition will confound the correct use," etc. That is a true utterance of the

used in the courts much as it is used in popular speech,—that is to say, in a tentative, literary, inexact way; and there are those who would let all such words alone, and not bother about precision. But, as our law develops, it becomes more and more important to give definiteness to its phraseology. Discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation and research that clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it. If they are used inexactly, it is well to know just how they are used.

(1) “Fact,” and its other forms, “factum” and “fait,” stand in our law books for various things, e. g.: (a) for an act, just as the word “fact” does in our older general literature; * * * (b) for that completed and operative transaction which is brought about by sealing and executing a certain sort of writing, and so for the instrument itself, the deed (factum); (c) as designating what exists, in contrast with what should rightfully exist,—*de facto*, as contrasted with *de jure*; (d) and so generally as indicating things, events, actions, conditions, as happening, existing, really taking place. This last is the notion that concerns us now. It is what Locke expresses when he speaks of “some particular existence, or, as it is usually termed, matter of fact.” The fundamental conception is that of a thing as existing or being true. It is not limited to what is tangible or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, propositions when conceived of as existing or being true are conceived of as facts. The question of whether a thing be a fact or not is the question of whether it is, whether it exists, whether it be true. All inquiries into the truth, the reality, the actuality of things, are inquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something, of the *rei veritas*. But this, it may be said, is a portentous sort of definition; it is turning every question into a question of fact. That inherited instinct of English-speaking lawyers and judges. But it is quite certain that, as our laws grow, it must be subjected more and more to the scrutiny of the legal scholar, and that it will profit by any serious and competent effort to classify and restate it.

is true, so far as any question asks about the existence, the reality, the truth of something. But, of course, in actual use the term has other limitations. In the sense now under discussion, as we have noticed, "fact" is confined to that sort of fact, ultimate fact, which is the subject of the issue. Moreover, that kind of fact which we call "law" is discriminated, and is set apart under its own name.

(2) What, then, do we mean by "law"? We mean, at all events, a rule or standard which it is the duty of a judicial tribunal to apply and enforce. It is not my present purpose to say anything as to the exact nature or origin of law. How the rule or standard comes into existence, where it is found, just what the nature of it is, how far it is the command of a supreme political power, and how far the silently-followed habit of the community, and other like questions, there is no occasion to consider now. It is enough to mark one characteristic of it, and to say that, in the sense now under consideration, nothing is law that is not a rule or standard which it is the duty of judicial tribunals to apply and enforce. I do not even care to say that all general standards that courts apply are to be called law. That matter I pass by. But this is true, and it is enough for our present purpose: That, unless there be a question as to a rule or standard which it is the duty of a judicial tribunal to apply, there is no question of law. The inquiry whether there is any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly to be classed together; and these are questions of law.

From Keener's Quasi Contracts, pp. 96-98.

Undoubtedly, what was once a question of fact may in time, in consequence of repeated adjudications, become a rule of law; as, for example, the rule that twenty-four hours is a reasonable length of time in which to give notice of the dishonor of a bill of exchange or promissory note, or the rule that twenty years' adverse possession establishes a prescriptive right, or the rule that a person is presumed to be dead who has been absent seven years without being heard of by those who naturally would have heard of him if he had

been alive. Therefore what is to-day a question of fact may in the future become a rule of law; but until a court is prepared to say that, on a given state of facts, a certain result shall follow in all cases presenting those facts, the question must be one of fact, and not of law. Even in the case where the rule is first laid down, the question should be treated as one of fact, if the conclusion reached by the court is reached by them, not because of their learning as lawyers, but for the reason that the court is of the opinion that no jury of reasonable intelligence could differ from the result which the court thinks should be reached.

It is frequently said that questions of law are for the court, while questions of fact are to be decided by the jury. If this statement were correct, it would be of assistance only in those cases where, because of previous adjudications, one could say that the question at issue was for the court, and not for the jury; but the statement is, in fact, not correct, if it is to be regarded as indicating anything more than the peculiar province of the jury. The special province of the jury is to pass upon the issuable allegations of fact in an action where the court would not be justified in setting aside the verdict as unreasonable.

It cannot be said, however, that the court has no right to pass upon questions of fact. It is not only the recognized right of the court to pass upon certain questions of fact, but it is the duty of the court so to do. For example, if the question of the admissibility of evidence depends upon facts about which there is a dispute, it is the duty of the court to decide that question of fact, and to admit or exclude the evidence offered, according to its finding of the fact upon which the admissibility of the evidence depends. Thus, if evidence is offered as the dying declaration of a person, and it is conceded that the case is a proper one for the admission of a dying declaration, if the person against whom it is offered denies that the party making the declaration believed himself to be in extremis it becomes necessary for the court to settle as a fact whether the person making the declaration regarded himself as in imminent danger of death.

Again, it is the duty of the court to require a jury to act as reasonable men in their findings as to the facts; and this the court does by directing a nonsuit or a verdict in the first instance, or by setting

aside a verdict which it thinks the facts did not authorize the jury, as reasonable men, to render. If, for example, the question is whether A. walked across the street, and the court is of opinion that no reasonable man could say that he did, the court should direct a nonsuit or a verdict. No one would seriously contend that because the court thinks that A. did not walk across the street, and so declares, the question of whether A. walked across the street has become one of law. This instance will suffice to show that all questions considered by the court are not questions of law, and the fact that this has not been clearly kept in mind has led to much confusion of expression, if not of thought.

§ 2. Laws of Nature and Laws of Man.

From Holland's Elements of Jurisprudence, 17-18.

In the theoretical, or as we should rather say in modern phrase, in the physical sciences. Law is used to denote the method of the phenomena of the universe; a use which would imply, in accordance with the primitive meaning of the term, that this method is imposed upon the phenomena either by the will of God, or by an abstraction called Nature.

This use of the term may certainly lead to misconceptions. It has long ago been agreed that all we can know of natural phenomena is that they co-exist with, or succeed, one another in a certain order, but whether this order be imposed immediately by a divine will, or mediately through an abstraction called Nature, or through minor abstractions called Gravitation, Electricity, and the like, the phenomena themselves are unable to inform us. It is therefore necessary to realise that when we talk of the laws of Gravity or of Refraction, we mean merely that objects do gravitate and that rays are refracted. We are using the term law merely to convey to our minds the idea of order and method, and we must beware of importing into this idea any of the associations called up by the term when it is employed in the practical sciences².

² The reader need hardly be reminded that by a "practical science" is not meant a body of rules for the government of practice (which would be an art), but the study of principles upon which, as a matter of fact, human action is governed. Holland, Jur. 23, note 1.—Ed.

Its use in these sciences is, speaking very generally, to express a rule of human action; and the sciences of human action being those in which the term is most used, and indeed is most needed, it is reasonable to say that this is its proper meaning, and that its use in the theoretical sciences is improper, or metaphorical merely.

But just as its metaphorical use, as meaning 'order,' is sometimes obscured by associations derived from its proper use as signifying 'a rule,' so is its proper use as 'a rule' occasionally confused by an imagined parity between a rule and the invariable order of nature.

The first step therefore towards clearing the term Law of ambiguity for the purposes of Jurisprudence is to discard the meaning in which it is employed in the physical sciences, where it is used, by a mere metaphor, to express the method or order of phenomena, and to adopt as its proper meaning that which it bears in the practical sciences, where it is employed as the abstract of rules of human action.

From Pollock's Essays in Jurisprudence and Ethics, 42-44.

The nature and extent of the analogy between laws, in the strict or political sense, and the uniformities in the course of physical events which we call "laws of nature," have often been discussed. Blackstone and earlier writers pressed the comparison with rhetorical inexactness, which has been rebuked by the later analytical school with some excess of severity, as if the likeness were merely verbal and misleading. Early in this century the correction was more modestly, but not less effectually, made by Blackstone's editor, Christian. "In all cases," he says, "where it" (the now law) "is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term may be found. * * * When we apply the word 'Law' to motion, matter, or the works of nature or of art, we shall find in every case that, with equal or greater propriety, we might have used the words, 'quality,' 'property,' or 'peculiarity.'" Still the resemblance, notwithstanding all criticism, is a real one. The laws made by princes and rulers aim, with more or less success, though never with perfect success, at producing uniformity of conduct within the field of action to which they apply. We observe in the court of nature uniformities which are constant. This constancy, compared with the partial and un-

certain obedience given to human ordinances, has in all times presented itself to men as the perfect fulfillment in another region of that which the lawgiver can only strive to attain. By laws we can, more or less, make men behave in particular ways. The constraints of express enactment or customary rules are sufficient, to some extent, but not altogether, to determine their acts and forbearances. But the powers of nature always behave in the same ways, and this readily suggests to our mind a constraint which is always present, and always efficient. Seedtime and harvest, the changes of the moon, the courses of the stars, come around without fail. Thus it would be with men's actions, if the law were always obeyed; and therefore we seem to see in nature a law more perfect than man's, because never broken. In some such way as this the phrase, "laws of nature," has come into common use; and, in the practice of modern writers, almost any general proposition in any branch of science may be called a law. That this manner of speaking should come to be regarded as containing an explanation of the facts is but one of innumerable instances of the tyranny constantly usurped over man by his own creatures,—words. But in following this track of resemblance we have introduced an important difference. At first sight the laws of nature seem to differ from those of man only in being inviolate; and their excellence in this respect is, indeed, a not uncommon topic of natural theology. But when we consider it more curiously the distinction is one of kind. The laws of nature are not more excellent than acts of parliament, but belong to another category. Christian has expressed the point as well as anybody: "When law is applied to any other object than man, it ceases to contain two of its essential ingredient ideas—namely, disobedience and punishment." A law of nature is obeyed, as we say, because there is no room for disobedience. In the case of laws in the proper sense, the law is one thing, and the obedience—or, as it may be disobedience—of any man subject to it is another thing. In the case of the law of nature there is no such difference. Human statutes, and even Divine ones, according to the majority of theologians, are commands addressed to agents who may or may not follow them. Their object is a certain uniformity, but the uniformity does not necessarily ensue. Nay, the law would still be a law if no single person obeyed it on any one occasion. But a law

of nature is inseparable from uniformity; or, rather, it is the uniformity itself.

§ 3. Law and Morality.

From Austin's Jurisprudence, §§ 169, 171-175.³

In consequence of the frequent coincidence of positive laws and rules of morality, and of the positive laws and the laws of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality, or on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

Again, the portion of positive law which is parcel of the law of nature (or, in the language of the classical jurists, which is parcel of the *jus gentium*) is often supposed to emanate, even as positive law, from a Divine or natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine Monarch. To say that it emanates, as positive law, from a Divine or natural source, is to confound positive law with law whereon it is fashioned, or whereunto it conforms.

Before leaving the subject of positive morality, I must note a prevailing tendency to confound what is, with what ought to be, law or morality,—that is, (1) to confound positive law with the science of legislation, and positive morality with deontology; and (2) to confound positive law with positive morality, and both with legislation and deontology.

A law which exists is a law, though we happen to dislike it, or though it vary from our assumed standard. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it, but the enumeration of the instances in which it has been forgotten would fill a volume.

Blackstone, for example, says, in his Commentaries, that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of

³ Campbell's edition of Austin is referred to in this compilation.

no validity, if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he may mean that, where human laws conflict with the Divine, we ought to obey the latter, rather than the former. If this be his meaning, I assent to it without hesitation, and have only to observe that, the sanctions of the Divine law being infinitely stronger and surer than those of human law, the proposition is identical, and a mere truism.

Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is binding. Now, to say this, is sheer nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been, and are continually, enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and, if I impugn the validity of the sentence on the ground that it is contrary to the law of God, the ultimate minister of justice (*videlicet*, the hangman) will demonstrate the inconclusiveness of my reasoning.

But this abuse of language is not merely puerile, it is mischievous; and in times of civil discord the mischief is apparent. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of utility may be useful. But to proclaim generally that all laws which are pernicious, or contrary to the will of God, are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

In another passage of his Commentaries, Blackstone enters into an argument to prove that a master cannot have a right to the labor of his slave. Had he contented himself with expressing his disapprobation—a very well-grounded one, certainly—of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right

has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.

From Holland's Elements of Jurisprudence, 26-29, 32, 33, 36, 37.

What may be vaguely called 'moral laws' are of very various origin and obligation. Their common characteristic is that, although no definite authority can be appealed to in case of their infraction, yet those who obey them are regarded with favour, and those who disobey them with disfavour, either by society in general or by a section of it. Under this large category may be classed the laws of usage in the pronunciation of words, of fashion in the choice of dress, of social demeanour, of professional etiquette, or of honour between gentlemen, as well as the gravest precepts of morality, specifically so called. All of them possess the common characteristic of being generally received in certain circles of society, while anything done in contravention of them exposes the transgressor to various shades of ridicule, hatred or coercion.

The weakest sort of these rules are undoubtedly those of fashion and etiquette; deviation from which is called eccentricity or vulgarity, and is visited by penalties varying from a smile to ostracism from society.

A somewhat stronger force may be attributed to the so-called law of honour, deviations from which are in this country stigmatised as 'conduct unbecoming a gentleman.' This however, so far as it exceeds in delicacy the dictates of ordinary morality, is recognised by a comparatively small class, and, as has been well observed, regulates only the duties betwixt equals.⁴ Far more important are those precepts which are more usually called principles of morality, and the infraction of which is called vice.

As to the origin and authority of the laws of fashion, and of the code of honour, there is no mystery. Every one admits that these are, though in different degrees, conventional, and have grown up in particular circles and states of society to which they were found

⁴ Paley, *Mor. Phil.* book i, ch. 2. 'The law of Honour is a system of rules constructed by people of fashion, and calculated to facilitate their intercourse with one another, and for no other purpose.' *Ibid.* Cf. Ihering, *Der Kampf um's Recht*, p. 25.

beneficial. With reference to those wider formulas called moral principles, there is by no means the same consent. This great body of maxims, regulating the relations of man to man in all the intercourse of life, would seem to have grown up partly under the influence of religion, partly out of speculative theories, partly out of the necessities of existence. Which of these ingredients is the essential, or the most essential, element of morality, may well be questioned. It is at any rate certain that morality is not due to the direct interposition of political authority.

Into the battles which are perpetually raging as to the essential quality of virtue in itself, and as to the faculty by which the virtuous quality of actions is discerned⁵, it is not the business of the jurist to enter. He is not obliged to decide whether the criterion of virtue be conduciveness to utility, or accordance with nature; nor need he profess his belief, or disbelief, either in an innate moral sense, or in a categorical imperative of the practical reason. These are the hard questions of Metaphysics. The business of the jurist is, in the first place, to accept as an undoubted fact the existence of moral principles in the world, differing in many particulars in different nations and at different epochs, but having certain broad resemblances; and, in the second place, to observe the sort of sanction by which these principles are made effective. He will then be in a position to draw unswervingly the line which divides such moral laws from the laws which are the subjects of his proper science.⁶

While the broad resemblance of the moral principles of mankind is universally admitted, the occasional divergencies between them are frequently lost sight of. The truth upon this point is admirably expressed by Paley. 'Moral approbation,' he writes, 'follows the fashions and institutions of the country we live in; which fashions also and institutions themselves have grown out of the exigencies, the climate, situation, or local circumstances of the

⁵ See e. g. Dugald Stewart, *Philosophy of the Active and Moral Powers*.

⁶ Cf. Kant, *Tugendlehre*, Werke, vii., p. 177. Cf. also the remarks of Seneca: 'Quam angusta innocentia est ad legem bonum esse? Quanto latius officiorum patet quam iuris regula? Quam multa pietas, humanitas, liberalitas, iustitia, fides exigunt, quae omnia extra publicas tabulas sunt?' *De Ira*, ii. 28.

country, or have been set up by the authority of an arbitrary chief-tain or the unaccountable caprice of the multitude?⁷

As to the sanction of moral rules, in the wide sense of the term, it was well said by Locke that 'no man escapes the punishment of their censure and dislike who offends against the fashion and opinion of the company he keeps, and would recommend himself to it.'⁸ Such rules are thus by no means without their appropriate sanction. We cannot therefore, with Thomasius, see in the presence or absence of compulsion the dividing characteristic between morality and Law⁹.

Enough has perhaps been said with reference to moral rules generally. One class of these rules has however exercised so wide an influence, and is so intimately connected with our more immediate subject, as to demand a more extended notice.

That portion of morality which supplies the more important and universal rules for the governance of the outward acts of mankind is called the 'Law of Nature.'

This is a plain and, it is submitted, true account of a subject upon which a vast amount of mystical writing has been expended. Such of the received precepts of morality relating to overt acts, and therefore capable of being enforced by a political authority, as either are enforced by such authority or are supposed to be fit so to be enforced, are called 'laws of Nature.' They are precepts obedience to which, whether it be or be not commanded by the State, is insisted upon by a deep-rooted public sentiment. Resting essentially upon public sentiment, they are rules of morality; but having reference only to such outward actions as are thought fit for political enforcement, they form only one class of such rules. After what has been said as to the origin and authority of moral rules in general, it will be unnecessary to discuss at length the origin and authority of such moral rules as are called natural laws.

⁷ Mor. Phil. book i. ch. 5. Cf. Herodotus, iii., 38; Arist. Eth. Nic. v. 7; Montaigne, Essais, i. ch. 22; Pascal, Pensées, iii. 8.

⁸ Human Understanding, book ii. §§ 1-12, where he scarcely does justice to the effects produced by sympathy with the sentiment of our fellow-creatures.

⁹ Fund. I. Nat. ii. c. 6. § 3. Cf. Arist. Eth. Nic. x. 9, 12, *ὁ δὲ νόμος ἀναγκαστικὴν ἔχει δύναμιν*.

Whatever may be the objective character of those laws¹⁰, whether they should be identified with the will of God, or should be supposed to be in some sort the guides even of that will, it is enough for the jurist that they certainly rest, like other moral rules, upon the support of public sentiment.

While there has been much difference of opinion as to the contents of the Law of Nature, the existence of such a law has been very generally admitted.

The term 'Law of Nature,' besides the sense in which we have just explained it, has been employed in a wider and also in a more restricted sense.

The wider is that of the well-known '*ius naturale*' of Ulpian, which he says prevails among animals as well as men, regulating the nurture of the young and the union of the sexes¹¹. It is obvious that the courses of action mentioned by Ulpian are followed in pursuance, not of a precept addressed to a rational will, which alone is properly called a 'law,' but rather of a blind instinct, resembling the forces which sway the inanimate world¹². Such an employment of the term is, in fact, fully as metaphorical as its use to express the order of the universe. A law for the nurture of offspring is no more intelligible than a law of gravitation.

It is in pursuance of this 'law,' which is supposed to govern the relations of men before they have originated any of those institutions which mark their superiority to the merely animal creation, that all men are asserted to be equal. '*Iure enim naturali ab initio omnes homines liberi nascebantur*'; which is equivalent to saying that before any laws were in existence, no differences between man and man were recognised by law. Ulpian's '*ius naturale*' is therefore a merely metaphorical phrase, leading to consequences which, however magniloquently they may be expressed, turn out upon analysis to be dangerous truisms. All legal right and wrong had its origin after human society was put in motion and began to reflect and act. To talk of law and right as applied to mankind at a sup-

¹⁰ Whether for instance it be more true to say with Cicero, de Leg. ii. 4, '*Lex vera ratio est recta summi iovis*,' or with Horace, Sat. i. 3, 98, '*Utilitas iusti prope mater et aequi*.'

¹¹ Iust. Inst. i. 2.

¹² Hesiod, Op. et Dies, 276.

posed period anterior to society beginning to think and act is a contradiction in terms¹³.

An employment of the term 'natural law' in a sense as much narrower than that which we have given it as Ulpian's is wider, is its identification with the '*ius gentium*.' The '*ius gentium*,' in its origin a system of positive law enforced among the Romans and the races with whom they were brought into commercial contact, was conceived of, doubtless as early as the second century B. C.¹⁴, as a body of principles which are found in the laws of all nations, and which therefore point to a similarity in the needs and ideas of all peoples. '*Ius autem gentium omni humano generi commune est; nam usu exigente et humanis necessitatibus gentes humanæ quædam sibi constituerunt. Bella etenim orta sunt et captivitates secutæ, et servitutes, quæ sunt naturali iuri contrariæ*'¹⁵. By the introduction of these precepts the narrow and strict law of Rome was gradually enriched and expanded. It was an afterthought to give them a higher authority and a philosophical significance by identifying them with the '*ius naturale*'. * * * * *

In contrast with the species of rules which we have just been considering, are rules set by a determinate authority.

Among such rules would no doubt be included rules imposed, or thought to be imposed, upon mankind by a God or Gods. Direct revelations of the will of a supernatural power, or such indirect intimations of that will as each man may find in his own conscience, have alike been described as 'laws of God'¹⁶. It has been believed that infractions of either class of God's laws, generally

¹³ Yet writers are not wanting to assure us that the genesis of law preceded even the development of the family. Zocco-Rosa, *Principii d'una Preistoria del Diritto*, 1885, p. 36.

¹⁴ Cic. de Off. iii. 69. Cf. Voigt, *Das Ius Naturale*, passim, and Prof. Nettleship, *Journal of Philology*, xii. p. 169.

¹⁵ *Iust. Inst.* i. 2. § 2. '*Gentium ius ... ab eo enim nominatum est ... et omnes gentes similiter eo sunt usæ; quod enim honestum et iustum est omnium utilitati convenit.*' *Frag. Vet. I. Cti.* Cf. Cic. de Off. iii. 17, *Tusc.* i. 13; *Gai. Inst.* iii. 93.

¹⁶ Austin introduces a new ambiguity into the term 'law of God,' by applying it complimentarily to the conclusions arrived at by the utilitarian philosophy as to the mode of producing the greatest happiness of the greatest number.

known as sins, are sooner or later to be redressed; whether, as among the Jews, the redress is to take the shape of temporal reward and punishment, or, as under the Christian dispensation, the readjustment of religious good and evil is postponed to a future state of existence. The laws of God thus resemble in almost every point, other than the essential points of source and sanction, those laws which we shall presently admit to be properly so called. It is however just this difference of source and sanction which withdraws them from the cognisance of Jurisprudence. Laws the author and upholder of which is superhuman are within the province of quite a different science, and the jurist may be warned, in the quaint words of Thomasius, 'not to put his sickle into the field of dread Theology¹⁷.'

Leaving therefore on one side those rules which are set by God, we come to those which are set by a definite human authority, and here we draw the final distinction between the case when such authority is, and the case when it is not, a sovereign political authority. Rules set by such an authority are alone properly called 'laws.'

By a successive narrowing of the rules for human action, we have at length arrived at such of those rules as are laws. A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.

More briefly, a general rule of external human action enforced by a sovereign political authority.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only.

¹⁷ 'Ne falcem hic immittamus in campum venerandae Theologiae'; Inst. Iur. Div., lib. i. c. 1. § 163. Elsewhere the same author doubts the truth of the conception of God as a law-giver. The wise man, he says, sees in God rather the teacher of a law of Nature, or a Father; Fund. I. Nat. et Gent. c. 5.

§ 4. Command and Custom.

From Austin's Jurisprudence, §§ 19-27.

* * * Every law or rule (taken with the largest signification which can be given to the term properly) is a command; or, rather, laws or rules, properly so called, are a species of commands.

Now, since the term "command" comprises the term "law," the first is the simpler, as well as the larger, of the two. But, simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analyzed with precision.

Accordingly, I shall endeavor, in the first instance, to analyze the meaning of "command"; an analysis which is necessarily difficult, and involves circumlocution in proportion as the term to be explained is simple.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. * * *

Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it.

Command and duty are therefore correlative terms, the meaning denoted by each being implied or supposed by the other. Wherever a duty lies, a command has been signified; and, whenever a command is signified, a duty is imposed.

The evil which will probably be incurred in case a command be disobeyed, or (to use an equivalent expression) in case a duty be broken,

is frequently called a "sanction." The command or the duty is said to be sanctioned by the chance of incurring the evil. Some sanctions are called "punishments."

Paley, in his analysis of the term "obligation," lays much stress upon the violence of the motive to compliance. His meaning appears to be that, unless the motive to compliance be violent or intense, the expression of a wish is not a command, nor does it place the person to whom it is directed under a duty.

But in truth the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation. But, where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and therefore imposes a duty. The sanction, if you will, is feeble or insufficient; but still there is a sanction, and therefore a duty and a command.

By Locke and Bentham, the term "sanction," or enforcement of obedience, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for these names, I think this extension of the term pregnant with confusion.

Rewards are, indisputably, motives to comply with the wishes of others. But to talk of commands and duties as sanctioned or enforced by rewards is surely a wide departure from the established meaning of the terms. If you expressed a desire that I should render a service, and proffered a reward as the inducement to render it, you would scarcely be said to command the service, nor should I, in ordinary language, be obliged to render it.

If we put reward into the import of the term "sanction," we must engage in a toilsome, and probably unsuccessful, struggle with the current of ordinary speech.

The ideas, then, comprehended by the term "command," are the following: (1) A wish or desire, conceived by a rational being, that another rational being shall do or forbear. (2) An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. (3) An expression or intimation of the wish by word, or other signs.

It appears from what has been premised that "command," "duty," and "sanction" are inseparably connected terms; that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

From Austin's Jurisprudence, §§ 33, 36.

I must now advert to certain objects improperly called "laws," not being commands, which may nevertheless be properly included within the province of jurisprudence, namely:

(1) Acts on the part of legislatures to explain positive law. Working no change in the actual duties of the governed, but simply declaring what those duties are, they are not commands, but, to borrow an expression from the writers on Roman law, acts of authentic interpretation. And though they are not laws, properly so called, they are so intimately connected with positive law as to come within the province of jurisprudence.

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect; legislative like judicial interpretation being frequently deceptive, and establishing new law under guise of expounding the old.

(2) Laws to repeal laws, and to release from existing duties. In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. These are often named "permissive" laws.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights, and duties answering those rights are therefore created or revived.

But this is a matter which I shall examine with exactness when I analyze the expressions "legal right," "permission by the sovereign or state," and "civil or political liberty."

(3) Imperfect laws, or laws of imperfect obligation.

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which therefore is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example. An imperfect law is not so

properly a law, as counsel or exhortation addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us, in England, laws professedly imperative are always, I believe, perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

Many of the writers on morals, and on the so-called laws of nature, have annexed a different meaning to the term "imperfect." Speaking of imperfect obligations, they commonly mean duties which are not legal; duties imposed by commands of God or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term "imperfect" denotes simply that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation.

By many of the admirers of customary laws (and, especially of their German admirers), they are thought to oblige legally (independently of the sovereign or state) because the citizens or subjects have observed or kept them. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice, but exist as positive law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. And consequently customary laws, considered as positive law, are not laws or rules, properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party, which is strongly opposed to customary law, and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law is purely the creature of the judges by whom it is established immediately. To suppose that it speaks the legislative will of the sovereign is one of the foolish or knavish fictions with which lawyers in every age and nation have perplexed the simplest truths.

It can easily be shown that each of these opinions is groundless; that customary law is imperative, in the proper signification of the

term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law when it is adopted as such, either by being expressly embodied in statutes promulgated by the sovereign authority, or implicitly by decisions of the courts of justice which are enforced by the power of the state.

For the legal rule introduced by a judicial decision (whether suggested by custom or not) is in effect legislation by the sovereign. A subordinate or subject judge is merely a minister. The rules which he makes derive their legal force from authority given by the state; an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence.

The opinion of the party which abhors judge-made laws springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by words (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are not words), the command is tacit.

Now, when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are tacit commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them; and it therefore signifies its pleasure, by that its voluntary acquiescence, "that they shall serve as a law to the governed."

It appears, then, that the positive law styled "customary," as well as all positive law made judicially, is established by the state, directly or circuitously. and therefore is imperative, although it is true that law made judicially and law made by statute are distinguished by weighty differences; and into the nature and reasons of these I shall inquire hereafter.

From Austin's Jurisprudence, §§ 771-783.

Every positive law obtaining in any community is a creature of the sovereign or state; having been established immediately by the monarch or supreme body, as exercising legislative or judicial functions, or having been established immediately by a subject individ-

ual or body, as exercising rights or powers or direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred.

But it is supposed by a multitude of writers on general and particular jurisprudence that there are positive laws which exist as positive laws, independently of a sovereign authority.

The kinds of positive law to which this independent existence is most frequently attributed, are these:

(1) Customary law, or the positive law, which is made by its immediate authors on customs or mores.

(2) The positive law, which is made by its immediate authors on opinions and practices of private lawyers.

(3) The law which, as forming a part, or as deemed to form a part, of every system or body of positive law, is styled "natural" or "universal."

To show the falsity of the supposition in question, through a brief examination of the natures of these three kinds of law, is the main object of the present lecture.

The law or rules styled "customary" may be divided into two classes,—those which are enforced by the tribunals without proof of their existence, and those which must be proved before the tribunals will enforce them.

Laws or rules of the former class, are styled "notorious," or it is said that the tribunals take judicial notice of them. Those of the latter class require proof, like any other fact on which the decision in the particular case depends. * * *

It is remarkable that the civil and canon laws, as obtaining in England, are ranked by Blackstone and Hale with particular customary laws.

The truth is, they are what would be styled by the Roman jurists "singular"; that is to say, not singular as applying exclusively to peculiar subjects, or as obtaining in districts or places, but as not harmonizing or being homogeneous with the great bulk of the system.

I shall advert for the present to general customary laws, and to those particular customary laws which tribunals will enforce without proof of their existence. Those particular customary laws of which the tribunals are not judicially informed, I shall consider

afterwards. For to them many of the remarks immediately following will not apply.

Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies is merely a rule of positive, or actual, morality, and derives its obligatory force from the sentiments called "public opinion."

Now a merely moral or merely customary rule may take the quality of a legal rule or law in two ways: It may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent, and in this case it is converted into a law after the judicial fashion.

On the first of these suppositions, the legal rule which is derived from the customary is statute law; and although fashioned by its immediate author, on a pre-existing custom, no one doubts that it derives its force as law from the legislative authority.

On the second of these suppositions, the legal rule which is derived from the customary is a rule of judiciary law. But though, as a rule of judiciary law, it is not less positive law than it would be if it were a statute, it often is deemed law emanating from custom, or *jus moribus constitutum*. For the judicial legislator naturally abstains from the show of legislation, and therefore, while really fashioning a new positive law on an old moral rule, he apparently applies an old law. And the cause of the moral rule (namely, custom) is not unfrequently, by a confusion of thought, supposed to be the source of the positive law established in accordance with it.

On either supposition, the source or fons of the legal rule is not *consensus utentium*, but the legislator or judge, as the case may be. But, when clothed with the legal sanction in the judicial mode, the law commonly is called "customary law." * * *

Law styled customary, then, is merely judiciary law, founded on custom, and owes its existence as law, like every other law, to the sanction of sovereign authority.

But it is commonly supposed by writers on jurisprudence (Roman, English, German, and others) that law shaped upon customs obtains as positive law, independently of the sanction adjoined to the customs by the state. It is supposed, for example, by Hale and Blackstone, and by other writers on English jurisprudence, that all

the judiciary law administered by the common-law courts, excepting the judiciary law which they have made upon statutes, is customary law, and that, since this customary law exists as positive law by force of immemorial usage, the decisions of those courts have not created, but have merely expounded or declared, it.

The following are a few specimens of the numerous absurdities and inconsistencies with which this hypothesis is pregnant:

All the customs immemorially current in the nation are not legally binding. But all these customs would be legally binding if the positive laws which have been made upon some of them obtained as positive laws by force of immemorial usage.

Positive law made upon custom is often abolished by parliament, or by judicial decisions. Indeed, the writers in question admit that the continuance of the rule as law depends on the sovereign pleasure. But supposing it existed as positive law, by virtue of the *consensus utentium*, it could not be abolished, conformably to that supposition, without the consent and authority of these, its imaginary founders.

According to the hypothesis in question, customary laws are not positive laws until their existence as such is declared to the people by decisions of the common-law courts. But if they existed as positive laws, because the people had observed them as merely customary rules, such decisions would not be necessary preliminaries to their existence in the former character. In truth, there is much of the judiciary law administered by the common-law courts which has not been formed upon immemorial custom, or upon any custom; much of it (such, for instance, as mercantile law relating to bills of exchange) having been made in recent times, on customs of recent origin, and much of it having been derived by its authors, the judges, from their own conceptions of public policy or expediency.

Finally, the hypothesis seems to be restricted to the rules of judiciary law which are administered by the common-law courts, though, if all the judiciary law administered by them must be deemed customary law, the hypothesis ought to be extended to all the judiciary law administered by the other tribunals.

The conceit that customary law obtains as positive law by virtue of the *consensus utentium* was suggested to its numerous modern

partisans by certain passages in Justinian's Pandects,—particularly the following passage of Julian:

"Inveterata consuetudo pro lege non immerito custoditur: Et hoc est jus, quod dicitur moribus constitutum. Nam quum ipsæ leges nulla alia ex causa nos teneant, quam quod iudicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, populus suffragio voluntatem suam declaret, an rebus ipsis et factis?"¹⁸

Without pausing to analyze the passage, I shall briefly remark on a few of the errors with which it overflows:

First. It confounds an act of the people, in its collective and sovereign capacity, with the acts of its members considered severally, and as subjects of the sovereign whole.

Secondly. The position maintained in the passage is this: That a customary rule, which the people actually observes, is equivalent to a law which the people establishes formally, since the people, which is the sovereign, is the immediate author of each.

Now, admitting that the position will hold where the people is the sovereign, how can the position possibly apply where the people is ruled by an oligarchy, or where it is subject to a monarch? During the virtual existence of the Roman commonwealth, the position maintained in the passage might have been plausible. But it is strange that the author of the passage, who lived under Hadrian and the Antonines, after the Roman world had become virtually a monarchy, did not perceive its absurdity. He must have known that the laws formally established by the virtual monarch, and customs observed spontaneously by the subject Roman community, could not be referred, in any sense whatever, to one and the same source. * * *

Now, customary law, as positive law, is established by the sovereign. And consequently whether it be introduced, or not, by the consent of the people, depends upon the form of the government. If the people are the sovereign, or if they share the sovereignty with one or a few; customary law, like other law, is, of course, introduced by their consent, in the strict acceptance of the term. But, if the people have no share in the sovereignty, they have no part what-

¹⁸ Digest, i. 3. 32.

ever in the introduction of positive law, customary or otherwise, and can only be said to consent to its introduction in the remote sense that they acquiesce, whether by reason of fear, or some other motive, in the existence of the government which establishes the law.

And under monarchies or oligarchies, as well as under governments purely or partially popular, much or most of the law which obtains in the community is commonly customary law. So that customary law cannot be a mark of freedom,—a term which means, if it mean anything, that the government of the community is purely or partially popular.

Sir William Blackstone's meaning may have been this: That the antecedent customs, which are the groundwork of customary law, are necessarily introduced by the consent of the people, or, in other words, are necessarily consonant to their interests or wishes.

But even this is false.

If the people be enlightened and strong, custom, like law, will commonly be consonant to their interests and wishes.

If they be ignorant and weak, custom, as well as law, will commonly be against them.

During the Middle Ages, the body of the people throughout Europe, were in the serf or slavish condition, and this slavish condition of the body of the people originated in custom, although the imperfect rights which custom gave to their masters, together with the imperfect obligations which custom imposed on themselves, were afterwards enforced by law of which that custom was the basis. In various parts of Europe the people have gradually escaped from the servile condition, through successive acts of the legislature. So that the body of the people in many of the European nations have been released, by direct legislation, from the servile and abject thralldom in which they had been held by custom, and by law framed upon custom. A notable recent instance is the emancipation of the serfs in Russia.

In Rome the absolute dominion of the paterfamilias over his wife and descendants arose from the custom, and consequent customary law, and was gradually abridged by direct legislation, namely, by the edicts of the prætors, the laws of the people, and the edictal constitutions of the emperors.

Let us turn our eyes in what direction we may, we shall find that there is no connection between customary law and the well-being of the many.

From Holland's Elements of Jurisprudence, 76-78.

Law has been for centuries described as a 'command,' but this description, though essentially true, is inadequate to the extent of being misleading. Austin, who very properly analyses a command into (1) a desire conceived by one rational being that another rational being should do or forbear, (2) an evil to proceed from the former and to be incurred by the latter in case of non-compliance with the wish, and (3) an expression of the wish by words or other signs, is unable to discover these characteristics in laws which are merely declaratory, or which repeal pre-existing law, or which, because they can be disobeyed with impunity, are said to be 'of imperfect obligation¹⁹.' Similar difficulties have been raised by Austin's critics with reference to other classes of laws: by Mr. Frederic Harrison, for instance, with reference to enabling statutes, laws conferring franchises, and rules of interpretation or of procedure²⁰.

Such cases will however cease to be anomalous if we recognise that every law is a proposition announcing the will of the State, and implying, if not expressing, that the State will give effect only to acts which are in accordance with its will, so announced, while it will punish, or at least visit with nullity, any acts of a contrary character. The State thus makes known what advantages it will protect as being legal rights, what disadvantages it will enforce as being legal duties, and what methods it will pursue in so doing.

The announcement may be made in many different ways. A law may be imperative, as 'Honour thy father and thy mother'; but it may also be in the indicative mood, as 'No contract for the sale of any goods, wares and merchandises, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised'; or 'From and

¹⁹ Jurisprudence, Lect. i.

²⁰ Fortnightly Review, 1878, p. 684.

after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act.²¹

The real meaning of all Law is that, unless acts conform to the course prescribed by it, the State will not only ignore and render no aid to them, but will also, either of its own accord or if called upon, intervene to cancel their effects. This intervention of the State is what is called the 'sanction' of law²¹. It is true that the State intervenes not only with a view to punishment, and occasionally to prevent anticipated illegality, but also to effect restitution, and this is perhaps its principal function; but before the commission of the wrong the announcement of State intervention in case of its commission operates upon the general mind by way of threat of punishment. It is a punishment to a wrongdoer, or to one who neglects to comply with prescribed courses of procedure, if his wrong be merely undone, or his faulty procedure fails of its effect, so that he has, as the saying goes, 'his trouble for his pains.' Law is, in fact, formulated and armed public opinion, or the opinion of the ruling body. It announces not only that certain states of things and courses of action are viewed by it with favour, but also that, in case of the invasion of these states of things, or in case of contrary courses of action being pursued, it will not only look on with disfavour, but will also, in certain events, actively intervene to restore the disturbed balance.

From Maine's Early History of Institutions, 357-368.

The duty of inquiring, if not how sovereignty arose, at all events through what stages it has passed, is in my judgment indispensable. It is only thus that we can assure ourselves in what degree the results of the Austinian analysis tally with facts.

There is, in truth, nothing more important to the student of jurisprudence than that he should carefully consider how far the observed facts of human nature and society bear out the assertions which are made, or seem to be made, about sovereignty by the ana-

²¹ 'Legum eas partes quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus.' Iust. Inst. ii. 1. 10.

lytical jurists. To begin with, these assertions must be disentangled from one another. The first of them is that, in every independent community of men, there resides the power of acting with irresistible force on the several members of that community. This may be accepted as actual fact. If all the members of the community had equal physical strength, and were unarmed, the power would be a mere result from the superiority of numbers; but, as a matter of fact, various causes, of which much the most important have been the superior physical strength, and the superior armament, of portions of the community, have conferred on numerical minorities the power of applying irresistible pressure to the individuals who make up the community as a whole. The next assertion is that in every independent political community—that is, in every independent community, neither in a state of nature, on the one hand, nor in a state of anarchy, on the other—the power of using or directing the irresistible force stored up in the society resides in some person, or combination of persons, who belong to the society themselves. The truth of this assertion is strongly suggested by a certain class of facts, particularly by the political facts of the Western and Modern world, but all the relevant facts, it must be recollected, have not been fully observed. The whole world, of which theorists on human nature are extremely apt to forget considerably more than half, and the entire history of the whole world, would have to be examined before we could be quite sure of the facts; and, if this were done, it may be that a great number of the facts would not so strongly suggest the conclusion, or, as I myself think, the assertion which we are considering would not so much be shown to be false as to be only verbally true, and therefore without the value which it possesses in societies of the type to which our own belongs. An assertion, however, which the great analytical jurists cannot be charged with making, but which some of their disciples go very near to hazarding, that the sovereign person or group actually wields the stored-up force of society by an uncontrolled exercise of will, is certainly never in accordance with fact. A despot with a disturbed brain is the sole conceivable example of such sovereignty. The vast mass of influences, which we may call, for shortness, moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by its sovereign. This is the point which, of all others, it is practically most necessary that

the student should bear in mind, because it does most to show what the Austinian view of sovereignty really is,—that it is the result of abstraction. It is arrived at by throwing aside all the characteristics and attributes of government and society except one, and by connecting all forms of political superiority together through their common possession of force. The elements neglected in the process are always important, sometimes of extreme importance, for they consist of all the influences controlling human action, except force directly applied or directly apprehended; but the operation of throwing them aside for purposes of classification is, I need hardly say, perfectly legitimate philosophically, and is only the application of a method in ordinary scientific use.

To put the same thing in another way, that which we reject in the process of abstraction by which the conception of sovereignty is reached is the entire history of each community. First of all, it is the history—the whole historical antecedents—of each society by which it has been determined where, in what person or group, the power of using the social force is to reside. The theory of sovereignty neglects the mode in which the result has been arrived at, and thus is enabled to class together the coercive authority of the great king of Persia, of the Athenian demos, of the later Roman emperors, of the Russian czar, and of the crown and parliament of Great Britain. Next, it is its history, the entire mass of its historical antecedents, which in each community determines how the sovereign shall exercise, or forbear from exercising, his irresistible coercive power. All that constitutes this—the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions, and some by the constitution of human nature—is rejected by the analytical jurists. And thus it is that, so far as the restrictions contained in their definition of sovereignty are concerned, the queen and parliament of our own country might direct all weakly children to be put to death, or establish a system of *lettres de cachet*.

The procedure of the analytical jurists is closely analogous to that followed in mathematics and political economy. It is strictly philosophical, but the practical value of all sciences founded on abstractions depends on the relative importance of the elements rejected and the elements retained in the process of abstraction. Tried by this

test, mathematical science is of greatly more value than political economy, and both of them than jurisprudence, as conceived by the writers I am criticising. Similarly, the misconceptions to which the Austinian analysis gives rise are very similar to those which might be conceived as embarrassing the student of mixed mathematics, and which do actually embarrass the student of political economy. Just as it is possible to forget the existence of friction in nature, and the reality of other motives in society except the desire to grow rich, so the pupil of Austin may be tempted to forget that there is more in actual sovereignty than force, and more in laws which are the commands of sovereigns than can be got out of them by merely considering them as regulated force. I am not prepared to deny that Austin occasionally, and Hobbes frequently, express themselves as if their system were not limited throughout by the limitation which is at its base. All the great masters of abstraction are, in fact, now and then betrayed into speaking or writing as if the materials thrown aside in the purely mental process were actually dross.

When, however, it has once been seen that in Austin's system the determination of sovereignty ought to precede the determination of law, when it is once understood that the Austinian conception of sovereignty has been reached through mentally uniting all forms of government in a group, by conceiving them as stripped of every attribute except coercive force, and when it is steadily borne in mind that the deductions from an abstract principle are never, from the nature of the case, completely exemplified in facts, not only, as it seems to me, do the chief difficulties felt by the student of Austin disappear, but some of the assertions made by him, at which the beginner is most apt to stumble, have rather the air of self-evident propositions. I dare say you are sufficiently acquainted with his treatise to make it enough for me to mention some of these propositions, without the amplifications which are necessary for their perfectly accurate statement. Jurisprudence is the science of positive law. Positive laws are commands addressed by sovereigns to their subjects, imposing a duty, or condition of obligedness, or obligation, on those subjects, and threatening a sanction, or penalty, in the event of disobedience to the command. A right is the faculty or power conferred by the sovereign on certain

members of the community to draw down the sanction on a fellow subject violating a duty. Now, all these conceptions of law, right, duty, and punishment depend upon the primary conception of sovereignty, just as the lower links of a chain hanging down depend upon the highest link. But sovereignty, for the purposes of Austin's system, has no attribute but force, and consequently the view here taken of "law," "obligation," and "right" is a view of them regarded exclusively as products of coercive force. The "sanction" thus becomes the primary and most important member of the series of notions, and gives its color to all the others. Probably nobody ever found a difficulty in allowing that laws have the character given to them by Austin, so far as such laws have proceeded from formal legislatures. But many persons, and among them some men of powerful mind, have struggled against the position that the great mass of legal rules which have never been prescribed by the organ of state, conventionally known as the legislature, are commands of the sovereign. The customary law of all countries which have not included their law in codes, and specially the English common law, have often had an origin claimed for them independently of the sovereign, and theories have been propounded on the subject which Austin scouts as mysterious and unintelligible. The way in which Hobbes and he bring such bodies of rules as the common law under their system is by insisting on a maxim which is of vital importance to it,—*"Whatever the sovereign permits, he commands."* Until customs are enforced by courts of justice, they are merely *"positive morality,"* rules enforced by opinion; but, as soon as courts of justice enforce them, they become commands of the sovereign, conveyed through the judges who are his delegates or deputies. It is a better answer to this theory than Austin would perhaps have admitted, that it is founded on a mere artifice of speech, and that it assumes courts of justice to act in a way and from motives of which they are quite unconscious. But, when it is clearly comprehended that in this system there are no associations with the sovereign but force or power, the position that what sovereigns permit they command becomes more easily intelligible. They command because, being by the assumption possessed of uncontrollable force, they could innovate without limit at any moment. The common law consists of their commands, because they can repeal or

alter or restate it at pleasure. The theory is perfectly defensible as a theory, but its practical value, and the degree in which it approximates to truth, differ greatly in different ages and countries. There have been independent political communities,—and, indeed, there would still prove to be some of them, if the world were thoroughly searched,—in which the sovereign, though possessed of irresistible power, never dreams of innovation, and believes the persons or groups by whom laws are declared and applied to be as much part of the necessary constitution of society as he is himself. There have, again, been independent political societies in which the sovereign has enjoyed irresistible coercive power, and has carried innovation to the furthest point, but in which every single association connected with law would have violence done to it if laws were regarded as his commands. The tyrant of a Greek city often satisfied every one of Austin's tests of sovereignty, yet it was part of the accepted definition of a tyrant that "he subverted the laws." Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language. It is carried on by taking words and propositions altogether out of the sphere of the ideas habitually associated with them.

Before proceeding to speak at some length in my next lecture of these historical limitations on the practical value of Austin's theories, let me repeat my opinion that if the method of discussion which seems to me correct had been followed in his treatise, and if the examination of sovereignty had preceded the examination of the conceptions dependent on it, a considerable number of the statements which he has made respecting these latter conceptions would have appeared, not merely innocent, but self-evident. Law is here regarded as regulated force, simply because force is the one element which has been allowed to enter into the primary notion upon which all the others depend. The one doctrine of this school of jurists which is repugnant to lawyers would lose its air of paradox if an assumption were made which, in itself theoretically unobjectionable, manifestly approximates to practical truth as the course of history proceeds,—the assumption that what the sovereign might alter, but does not alter, he commands. The same arrangement would have a further advantage, as it seems to me, through the modifications it would necessitate in Austin's man-

ner of discussing Morality, though the subject is not one which can be here treated with completeness. The position at which many readers have stumbled—I do not affect to do more than state it in popular language—is that the sanction of moral rules, as such, is the disapprobation which one's fellow men manifest at their violation. It is sometimes construed to mean that the only motive for obeying moral rules is the fear of such disapprobation. Such a construction of Austin's language is an entire misconception of his meaning, but, if the order of discussion which I advocate had been followed, I do not think it could ever possibly occur to any mind. Let us suppose Austin to have completed his analysis of sovereignty, and of the conceptions immediately dependent on it,—law, legal right, and legal obligation. He would then have to examine that great mass of rules, which men in fact obey, which have some of the characteristics of laws, but which are not, as such, imposed by sovereigns on subjects, and which are not, as such, enforced by the sanction supplied by sovereign power. It would be, of course, incumbent on the philosophical jurist to examine these rules, because sovereigns, being by his hypothesis human superiors, are, as human beings, subject to them. Austin has, in fact, examined them from this point of view in some of his most interesting passages. While insisting that sovereignty is, from the nature of the case, incapable of legal limitation, he fully admits that sovereigns are restrained from issuing some commands, and determined to issue others, by rules which, though they are not laws, are of extreme cogeney. The crown and parliament of Great Britain are, in his view, sovereign,—a sovereign aristocracy, as he would call it; but, though this aristocracy could, for purposes of argument, do anything it pleased, it would be outraging all experience to assert that it does this. That great body of rules which is embodied in constitutional maxims keeps it from doing some things. That great body of rules which in ordinary usage are called “moral” keeps it from doing others. What common characteristics has this aggregate of rules which operate on men, and on sovereigns like other men? Austin, as you know, names it “positive morality,” and says that its sanction is opinion, or the disapproval of the bulk of the community following on its violation. Properly understood, this last is an obviously true proposition, for what is meant is that public dis-

approbation is the one sanction which all these rules have in common. The rule which keeps the crown and parliament from declaring murder legal, and the rule which keeps them from allowing the queen to govern without ministers, are connected together through the penalty attendant on a breach of them, which is the strong disapprobation of a majority of Englishmen; and it is their having a sanction of some kind which principally connects both rules with laws proper. But, though fear of opinion be a motive for obedience to both rules, it does not at all follow that the sole motive for obedience to both rules is fear of opinion. This fear would be allowed by most people to be the chief, if not the exclusive, motive for obedience to constitutional rules; but such an admission involves no necessary assertion whatever as to the complete sanction of moral rules. The truth is that Austin's system is consistent with any ethical theory; and, if Austin seems to assert the contrary, I think the cause is to be sought in his firm conviction of the truth of his own ethical creed, which, I need not say, was utilitarianism in its earlier shape.

From Maine's Early History of Institutions, 371-375, 379-394.

The word "law" has come down to us in close association with two notions,—the notion of order and the notion of force. The association is of considerable antiquity, and is disclosed by a considerable variety of languages; and the problem has repeatedly suggested itself, which of the two notions thus linked together is entitled to precedence over the other, which of them is first in point of mental conception? The answer, before the analytical jurists wrote, would, on the whole, have been that "law," before all things, implied order. "Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus, we say the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of nations." With these words Blackstone begins that chapter on "The Nature of Laws in General," which may almost be said to have made Bentham and Austin into jurists by virtue of sheer repulsion. The analytical jurists, on the other hand, lay down unhesitatingly that the notion of force has priority over the notion of order. They say that a true law, the command of an irresistible

sovereign, enjoins a class of acts or a class of omissions either on a subject, or on a number of subjects, placed by the command alike and indifferently under a legal obligation. The characteristic which thus, as a matter of fact, attaches to most true laws of binding a number of persons, taken indifferently, to a number of acts or omissions, determined generally, has caused the term "law" to be extended by metaphor to all uniformities or invariable successions in the physical world, in the operations of the mind, or in the actions of mankind. "Law," when used in such expressions as the "law of gravity," the "law of mental association," or the "law of rent," is treated by the analytical jurists as a word wrested from its true meaning by an inaccurate figurative extension, and the sort of disrespect with which they speak of it is extremely remarkable. But I suppose that, if dignity and importance can properly be attributed to a word, there are in our day few words more dignified and more important than "law," in the sense of the invariable succession of phenomena, physical, mental, or even politico-economical. With this meaning, "law" enters into a great deal of modern thought, and has almost become the condition of its being carried on. * * *

The statement that, in all languages, law primarily means the command of a sovereign, and has been applied derivatively to the orderly sequences of nature, is extremely difficult of verification; and it may be doubted whether its value, if it be true, would repay the labor of establishing its truth. The difficulty would be the greater because the known history of philosophical and juridical speculation shows us the two notions which, as a matter of fact, are associated with law, acting and reacting on one another. The order of nature has unquestionably been regarded as determined by a sovereign command. Many persons to whom the pedigree of much of modern thought is traceable conceived the particles of matter which make up the universe as obeying the commands of a personal God just as literally as subjects obey the commands of a sovereign through fear of a penal sanction. On the other hand, the contemplation of order in the external world has strongly influenced the view taken of laws proper by much of the civilised part of mankind. The Roman theory of a law natural has affected the whole history of law, and this famous theory is in fact compounded of two elements, one furnished by an early perception, Greek in origin, of a cer-

tain order and regularity in physical nature, and the other attributable to an early perception, Roman in origin, of a certain order and uniformity among the observances of the human race. I need not here repeat the proof of this which I attempted to give in a volume published some years ago. Nobody is at liberty to censure men, or communities of men, for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other. The laws with which the student of jurisprudence is concerned in our own day are undoubtedly either the actual commands of sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula, "a law is a command," by help of the formula, "whatever the sovereign permits, is his command."²² From the point of view of the jurist, law is only associated with order through the necessary condition of every true law that it must prescribe a class of acts or omissions, or a number of acts and omissions determined generally; the law which prescribes a single act not being a true law, but being distinguished as an "occasional" or "particular" command. Law, thus defined and limited, is the subject-matter of jurisprudence, as conceived by the analytical jurists. At present we are only concerned with the foundations of their system, and the questions which I wish to raise in the present lecture are these: Has the force which compels obedience to a law always been of such a nature that it can reasonably be identified with the coercive force of the sovereign? And have laws always been charac-

²² * * * If Austin intended to state, broadly and generally, that 'everything which the sovereign permits he tacitly commands,' the assertion is, no doubt, untenable. But, as it appears to me, Austin does not say this, nor was it necessary for him to say this. He does not say 'whatever the sovereign permits to anybody,' but 'whatever the sovereign permits to a judge'; nor does he even say 'whatever is permitted to a judge,' but 'whatever is permitted to a judge to order, and is enforced by sovereign authority when it is ordered.' This is what I understand Austin to say is equivalent to a command issued by the sovereign authority itself. Nor does this seem to me to be an extravagant assertion." Mark. El. Law, 10-Edition.

terized by that generality which, it is said, alone connects them with physical laws, or general formulas describing the facts of nature?

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There are, however, another set of cases, known to us from sources of knowledge of which it is perhaps fair to say that (though Austin is in one sense a modern writer) they were hardly open when he wrote, —cases in which the application of his principles is at least difficult and doubtful. It is from no special love of Indian examples that I take one from India, but because it happens to be the most modern precedent in point. My instance is the Indian province called the “Punjaub,” the “Country of the Five Rivers,” in the state in which it was for about a quarter of a century before its annexation to the British Indian empire. After passing through every conceivable phase of anarchy and dormant anarchy, it fell under the tolerably consolidated dominion of a half-military, half-religious oligarchy, known as the “Sikhs.” The sikhs themselves were afterwards reduced to subjection by a single chieftain belonging to their order, Runjeet Singh. At first sight, there could be no more perfect embodiment than Runjeet Singh of sovereignty, as conceived by Austin. He was absolutely despotic. Except occasionally on his wild frontier, he kept the most perfect order. He could have commanded anything. The smallest disobedience to his commands would have been followed by death or mutilation, and this was perfectly well known to the enormous majority of his subjects. Yet I doubt whether once in all his life he issued a command which Austin would call a law. He took as his revenue a prodigious share of the produce of the soil. He harried villages which recalcitrated at his exactions, and he executed great numbers of men. He levied great armies. He had all material of power, and exercised it in various ways. But he never made a law. The rules which regulated the life of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village communities,—that is, in groups no larger, or little larger, than those to which the application of Austin’s principles cannot be effected, on his own admission, without absurdity.

I do not for a moment assert that the existence of such a state of political society falsifies Austin’s theory, as a theory. The great maxim by which objections to it are disposed of is, as I have so often

said before, "What the sovereign permits, he commands." The sikh despot permitted heads of households and village elders to prescribe rules. Therefore these rules were his commands, and true laws. Now, we can see that an answer of this kind might have some force if it were made to an English lawyer who denied that the sovereign in England had ever commanded the common law. The crown and parliament command it, because the crown and parliament permit it, and the proof that they permit it is that they could change it. As a matter of fact, since the objection was first advanced the common law has been largely encroached upon by act of parliament; and, in our own day, it is possible that it may come to owe the whole of its binding force to statute. But my oriental example shows that the difficulty felt by the old lawyers about the common law may have once deserved more respect than it obtained from Hobbes and his successors. Runjeet Singh never did or could have dreamed of changing the civil rules under which his subjects lived. Probably he was as strong a believer in the independent obligatory force of such rules as the elders themselves who applied them. An Eastern or Indian theorist in law, to whom the assertion was made that Runjeet Singh commanded these rules, would feel it stinging him exactly in that sense of absurdity to which Austin admits the appeal to be legitimate. The theory remains true in such a case, but the truth is only verbal.

You must not suppose that I have been indulging in a merely curious speculation about a few extreme cases to which the theory of sovereignty, and of law founded on it, will not apply without straining of language. In the first place, the Punjaub under Runjeet Singh may be taken as a type of all oriental communities in their native state, during their rare intervals of peace and order. They have ever been despotisms, and the commands of the despots at their head, harsh and cruel as they might be, have always been implicitly obeyed. But then these commands, save in so far as they served to organize administrative machinery for the collection of revenue, have not been true laws. They have been of the class called by Austin occasional or particular commands. The truth is that the one solvent of local and domestic usage in those parts of the world of which we have any real knowledge has been not the command of the sovereign, but the supposed command of the Deity. In India, the influence of the Brahminical treatises on mixed law and religion in sapping the old cus-

tomary law of the country has always been great, and in some particulars, as I tried to explain on a former occasion, it has become greater under English rule.

It is important to observe that, for the purposes of the present inquiry, the state of political society which I have described as Indian or oriental is a far more trustworthy clue to the former condition of the greatest part of the world than is the modern social organisation of Western Europe, as we see it before our eyes. It is a perhaps not unreasonable impression that sovereignty was simpler and more easily discovered in the ancient than in the modern world. The critic of Hobbes and Austin, whom I before quoted, writes, "In every state of which we read, whether Greek, Phœnician, Italian, or Asiatic, there was a sovereign of some sort, whose authority was absolute while it lasted"; and he adds that, "if Hobbes had tried to write an imaginary history of mankind, he could not have constructed one better fitted for his purpose than the history of the foundation and establishment of the Roman empire." I put aside for awhile the consideration of the Roman empire, and my reasons for doing so will become apparent afterwards; but, if we give our attention to empires at all resembling that of the Romans in territorial extent, we shall find that, properly understood, they are very far from corresponding to the great leviathan imagined by Hobbes. We know something of the Assyrian and Babylonian empires, from Jewish records, and something of the Median and Persian empires, from Greek records. We learn from these that they were, in the main, tax-taking empires. We know that they raised enormous revenues from their subjects. We know that, for occasional wars of conquest, they levied vast armies from populations spread over immense areas. We know that they exacted the most implicit obedience to their occasional commands, or punished disobedience with the utmost cruelty. We know that the monarchs at their head were constantly dethroning petty kings, and even transplanting whole communities. But, amid all this, it is clear that in the main they interfered but little with the every-day religious or civil life of the groups to which their subjects belonged. They did not legislate. The "royal statute" and "firm decree" which has been preserved to us as a sample of "law of the Medes and Persians, which altereth not," is not a "law" at all, in the modern juridical acceptance of the term. It is what Austin would call a "particular command,"—

a sudden, spasmodic, and temporary interference with ancient, multifarious usage, left in general undisturbed. What is even more instructive is that the famous Athenian empire belonged to the same class of sovereignties as the empire of the great king. The Athenian assembly made true laws for residents on Attic territory, but the dominion of Athens over her subject cities and islands was clearly a tax-taking, as distinguished from a legislating, empire.

The difficulty of employing Austin's terminology of these great governments is obvious enough. How can it conduce to clear thinking to speak of the Jewish law as commanded at one period by the great king at Susa? The cardinal rule of the analytical jurists, "what the sovereign permits, he commands," remains verbally true; but against its application in such a case there lies an appeal to a higher tribunal, of which Austin allows the jurisdiction, —our sense of the ridiculous.

I have now reached the point at which I can conveniently state my own opinion of the practical limitations which must be given to the system of the analytical jurists in order that it may possess, I will not say theoretical truth, but practical value. The Western world, to which they confined their attention, must be conceived as having undergone two sets of changes. The states of modern Europe must be conceived as having been formed in a manner different from the great empires of antiquity (save one), and from the modern empires and kingdoms of the East, and a new order of ideas on the subject of legislation must be conceived as having been introduced into the world through the empire of the Romans. Unless these changes had taken place, I do not believe that the system would ever have been engendered in the brain of its authors. Wherever these changes have not taken place, I do not believe the application of the system to be of value.

The most nearly universal fact which can be asserted respecting the origin of the political communities called "states" is that they were formed by the coalescence of groups, the original group having been in no case smaller than the patriarchal family. But in the communities which came into existence before the Roman empire, and in those which have been slightly affected by it, or not at all, this coalescence was soon arrested. There are some traces of the process everywhere. The hamlets of Attica coalesce to form

the Athenian state, and the primitive Roman state is formed by the coalescence of the minute communities on the original hills. In very many Indian village communities there are signs of smaller elements combining to make them up. But this earlier coalescence soon stops. In a later stage, political communities, wearing a superficial resemblance to the Roman empire, and often of very great territorial extent, are constructed by one community conquering another, or one chieftain, at the head of a single community or tribe, subjugating great masses of population. But, independently of the Roman empire and its influence, the separate, local life of the small societies included in these great states was not extinguished, or even much enfeebled. They continued as the Indian village community has continued, and, indeed, even in their most glorious forms, they belonged essentially to that type of society. But the process of change by which the states of the modern world were formed has been materially different from this. The smaller groups have been much more completely broken up and absorbed in the larger, the larger have again been swallowed up in still wider, and these in yet wider, areas. Local life and village custom have not, it is true, decayed everywhere in the same degree. There is much more of them in Russia than in Germany; more of them in Germany than in England; more of them in England than in France. But, on the whole, whenever the modern state is formed it is an assemblage of fragments considerably smaller than those which made up empires of the earlier type, and considerably liker to one another.

It would be rash to lay down confidently which is cause and which is consequence, but unquestionably this completer trituration in modern societies of the groups which once lived with an independent life has proceeded concurrently with much greater activity in legislation. Wherever the primitive condition of an Aryan race reveals itself either through historical records, or through the survival of its ancient institutions, the organ which in the elementary group corresponds to what we call the "legislature" is everywhere discernible. It is the village council, sometimes owning a responsibility to the entire body of villagers, sometimes disclaiming it, sometimes overshadowed by the authority of an hereditary chief, but never altogether obscured. From this embryo have

sprung all the most famous legislatures of the world, the Athenian Ekklesia, the Roman comitia, senate, and prince, and our own parliament, the type and parent of all the "collegiate sovereignties" (as Austin would call them) of the modern world, or in other words of all governments in which sovereign power is exercised by the people, or shared between the people and the king. Yet, if we examine the undeveloped form of this organ of state, its legislative faculty is its least distinct and least energetic faculty. In point of fact, as I have observed elsewhere, the various shades of the power lodged with the village council, under the empire of the ideas proper to it, are not distinguished from one another; nor does the mind see a clear difference between making a law, declaring a law, and punishing an offender against a law. If the powers of this body must be described by modern names, that which lies most in the background is legislative power; that which is most distinctly conceived is judicial power. The laws obeyed are regarded as having always existed, and usages really new are confounded with the really old.

The village communities of the Aryan race do not therefore exercise true legislative power so long as they remain under primitive influences. Nor, again, is legislative power exercised, in any intelligible sense of the words, by the sovereigns of those great states, now confined to the East, which preserve the primitive local groups most nearly intact. Legislation, as we conceive it, and the break up of local life appear to have universally gone on together. Compare the Hindoo village community in India with the Teutonic village community in England. The first of them, among all the institutions of the country which are not modern and of British construction, is far the most definite, far the most strongly marked, far the most highly organized. Of the latter, the ancient English community, the vestiges may certainly be tracked; but the comparative method has to be called in, and the written law and written history of many centuries searched, before their significance can be understood, and the broken outline restored to completeness. It is impossible not to connect the differing vitality of the same institution with certain other phenomena of the two countries. In India, Mogul and Mahratta, following a long series of earlier conquerors, have swept over the village communities; but, after includ-

ing them in a nominal empire, they have imposed no permanent obligation beyond the payment of tax or tribute. If, on some rare occasions, they have attempted the enforced religious conversion of subrogated populations, the temples and the rites have been, at most, changed in the villages, while the civil institutions have been left untouched. Here in England the struggle between the central and the local power has followed a very different course. We can see plainly that the king's law and the king's courts have been perpetually contending against the local law and the local courts, and the victory of the king's law has drawn after it the long series of acts of parliament founded on its principles. The whole process can only be called legislation ever increasing in energy, until the ancient multifarious law of the country has been all but completely abolished, and the old usages of the independent communities have degenerated into the customs of manors, or into mere habits having no sanction from law.

There is much reason to believe that the Roman empire was the source of the influences which have led, immediately or ultimately, to the formation of highly-centralized, actively legislating states. It was the first great dominion which did not merely tax, but legislated also. The process was spread over many centuries. If I had to fix the epochs of its commencement and completion, I should place them roughly at the issue of the first edictum provinciale, and at the extension of the Roman citizenship to all subjects of the empire; but, no doubt, the foundations of the change were laid considerably before the first period, and it was continued in some ways long after the last. But, in the result, a vast and miscellaneous mass of customary law was broken up and replaced by new institutions. Seen in this light, the Roman empire is accurately described in the prophecy of Daniel. It devoured, brake in pieces, and stamped the residue with its feet.

The irruption of the barbarian races into the empire diffused through the communities included in it a multitude of the primitive tribal and village ideas which they had lost. Nevertheless no society directly or indirectly influenced by the empire has been altogether like the societies formed on that more ancient system which the immobility of the East has continued till we can actually observe it. In all commonwealths of the first kind, sovereignty is

more or less distinctly associated with legislative power, and the direction in which this power was to be exercised was in a considerable number of countries clearly chalked out by the jurisprudence which the empire left behind it. The Roman law, from which the most ancient legal notions had been almost wholly expelled, was palpably the great solvent of local usage everywhere. There are thus two types of organized political society. In the more ancient of these, the great bulk of men derive their rules of life from the customs of their village or city; but they occasionally, though most implicitly, obey the commands of an absolute ruler who takes taxes from them but never legislates. In the other, and the one with which we are most familiar, the sovereign is ever more actively legislating on principles of his own, while local custom and idea are ever hastening to decay. It seems to me that, in the passage from one of these political systems to another, laws have distinctly altered their character. The force, for example, which is at the back of law, can only be called the same by a mere straining of language. Customary law—a subject on which all of Austin's remarks seem to me comparatively unfruitful—is not obeyed, as enacted law is obeyed. When it obtains over small areas, and in small natural groups, the penal sanctions on which it depends are partly opinion, partly superstition, but to a far greater extent an instinct almost as blind and unconscious as that which produces some of the movements of our bodies. The actual constraint which is required to secure conformity with usage is inconceivably small. When, however, the rules which have to be obeyed once emanate from an authority external to the small natural group and forming no part of it, they wear a character wholly unlike that of a customary rule. They lose the assistance of superstition, probably that of opinion, certainly that of spontaneous impulse. The force at the back of law comes therefore to be purely coercive force to a degree quite unknown in societies of the more primitive type. Moreover, in many communities, this force has to act at a very great distance from the bulk of the persons exposed to it; and thus the sovereign who wields it has to deal with great classes of acts, and with great classes of persons, rather than with isolated acts and with individuals. Among the consequences of this necessity are many of the

characteristics sometimes supposed to be inseparable from laws, their indifference, their inexorableness, and their generality.

And as the conception of force associated with laws has altered, so also, I think, has the conception of order. In the elementary social groups formed by men of the Aryan race, nothing can be more monotonous than the routine of village custom. Nevertheless, in the interior of the households which together make up the village community, the despotism of usage is replaced by the despotism of paternal authority. Outside each threshold is immemorial custom blindly obeyed. Inside is the *patria potestas* exercised by a half civilized man over wife, child, and slave. So, far, then, as laws are commands, they would be associated in this stage of society less with invariable order than with inscrutable caprice; and it is easier to suppose the men of those times looking to the succession of natural phenomena, day and night, summer and winter, for types of regularity, than to the words and actions of those above them who possessed coercive power over them.

The force then which is at the back of laws was not always the same. The order which goes with them was not always the same. They have only gradually attracted to themselves the attributes which seem essential to them not only in the popular view but to the penetrating eye of the analytical jurist. Their generality, and their dependence on the coercive force of a sovereign, are the result of the great territorial area of modern states, of the comminution of the subgroups which compose them, and above all of the example and influence of the Roman commonwealth under assembly, senate, and prince, which from very early times was distinguished from all other dominations and powers, in that it broke up more thoroughly that which it devoured.

From Holland's Elements of Jurisprudence, 50-56.

Usage, or rather the spontaneous evolution by the popular mind of rules the existence and general acceptance of which is proved by their customary observance, is no doubt the oldest form of law-making. It marks the transition between morality and law. Morality plus a State-organization enforcing the observance of certain parts of it is customary law.

Two questions are much debated with reference to usage. First,

as to the mode of its growth as usage. Secondly, as to its transformation into law.

Its characteristic is that it is a long and generally observed course of conduct. No one was ever consciously present at the commencement of such a course of conduct, but we can hardly doubt that it originated generally in the conscious choice of the more convenient of two acts, though sometimes doubtless in the accidental adoption of one of two indifferent alternatives; the choice in either case having been either deliberately or accidentally repeated till it ripened into habit.

The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common. One man crosses the common, in the direction which is suggested either by the purpose he has in view, or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made.

Before a custom is formed there is no juristic reason for its taking one direction rather than another, though doubtless there was some ground of expediency, of religious scruple, or of accidental suggestion. A habitual course of action once formed gathers strength and sanctity every year. It is a course of action which every one is accustomed to see followed: it is generally believed to be salutary, and any deviation from it is felt to be abnormal, immoral. It has never been enjoined by the organised authority of the State, but it has been unquestioningly obeyed by the individuals of which the State is composed. There can in fact be no doubt that customary rules existed among peoples long before nations or states had come into being. At first no distinction was made between such of these rules as relate to individual character and such as concern society. Morality and customary rules were the same thing, but the distinction between the two was more and more sharply drawn as time went on.

After the organisation of States, many of the customary rules of society still continued to be recognised, and acquired a further sanction. They had previously been enforced only by popular opinion, or by the licensed revenge of injured parties. They were now enforced by the political authority. They became law; and were doubtless for the time the only laws known. They were the

unwritten, but well known, opinions of the community as to social right and wrong. * * *

Custom exists as law in every country, though it everywhere tends to lose its importance relatively to other kinds of law. It was known at Rome as the '*ius moribus constitutum*.' It is known in England as 'the common law,' or 'the custom of the realm,' the existence of which is now usually proved by showing that it has been affirmed by the courts, or at least has been appealed to in the writings of great judicial sages. At an earlier epoch it was doubtless known to all whom it concerned, much as are now the ordinary rules of morality.²³ Thus the law was declared in the English as in the Frankish hundredmoots, not by any judicial officer, but by the whole body of freemen present, who were represented in later times by the *Rachimburgi*, the *Schöffen*, and the Grand Jury. The increasing complexity of affairs, and the numerous other subjects opened up to human thought, have rendered the general consciousness of law-rules impossible, and have rendered necessary the more circuitous proof of their existence by means of Treatises and Reports.

It is certain that customs are not laws when they arise, but that they are largely adopted into the law by State recognition. How far does this recognition extend? Is it the case that all customary rules on proof of their existence as customs obtain State recognition as laws? In other words, does the determinate and organised will of the nation invariably adopt and confirm, for all matters within its cognisance, the rules which have been adopted for such matters by the indeterminate and unorganised will of the nation, or of portions of it?

This cannot be maintained. English Courts require not only that a custom shall be proved to exist, but also that it is 'reasonable.'²⁴ And the legislature often abrogates customs, partially or wholesale.

The State, through its delegates the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the Courts give operation, not merely prospectively from the date of such recogni-

²³ Cf. Savigny, *System*, i. p. 181.

²⁴ '*Malus usus est abolendus*.' Co. Litt. s. 212; cf. *Cuthbert v. Cumming*, 10 Ex. 809, 11 Ex. 405.

tion, but also retrospectively; so far implying that the custom was law before it received the stamp of judicial authentication. The contrary view supported by Austin is at variance with fact. The element of truth in his view, which he has done good service by bringing into prominence, is that usage, though it may make rules, cannot, without obtaining for them the recognition of the state, make laws. The element of mistake in his view is to date the state recognition from the moment that the usage has been called in question and allowed to be good in a court of justice.

If this is not the moment at which the State imprimatur is given to custom, what is that moment? We can only say that the rule that a Court shall give binding force to certain kinds of custom is as well established as hundreds of other rules of law, and has been established in the same manner. The judges acting as delegates of the State, have long ago legislated upon this point as upon many others. Not having a code ready to their hand with rules for every emergency, they have invoked, as the ratio of their decisions, not only Equity, or the generally acknowledged view of what is fair, and previous decisions of the Courts, upon the faith of which it is to be presumed that people have been acting, but also customs, established among, and by, the people at large, as presumably embodying the rules which the people have found suitable to the circumstances of their lives. The Courts have therefore long ago established as a fundamental principle of law, subject of course in each case to many restrictions and qualifications, that, in the absence of a specific rule of written law, regard is to be had in looking for the rule which governs a given set of circumstances, not only to Equity and to previous decision, but also to custom.²⁵

Binding authority has thus been conceded to custom, provided it fulfils certain requirements, the nature of which has also long since been settled, and provided it is not superseded by law of a higher authority.

When, therefore, a given set of circumstances is brought into Court, and the Court decides upon them by bringing them within the operation of a custom, the Court appeals to that custom as it might to any other pre-existent law. It does not proprio

²⁵ See a critique upon my view by Prof. Dewey, 9 Pol. Sci. Quarterly, p. 47.

motu then for the first time make that custom a law; it merely decides as a fact, that there exists a legal custom, about which there might up to that moment have been some question, as there might about the interpretation of an Act of Parliament. It then applies the custom to the circumstances just as it might have applied an Act of Parliament to them. A good custom or an intelligible Act of Parliament either exists or does not exist objectively, before the case comes into Court; although it is from the decision of the Court in the particular case that a subjective knowledge is first possible for the people of the existence or non-existence of the alleged custom, or that this or that is the meaning of the Act of Parliament.

The legal character of reasonable ancient customs is to be ascribed, not to the mere fact of their being reasonable ancient customs, but to the existence of an express or tacit law of the State giving to such customs the effect of laws.

We have described the mode in which the State usually acts in giving to custom the force of law. It also may occasionally do so in express terms. It sometimes in express terms denies them any such force, and sometimes limits the force which has hitherto been ascribed to them. In some States greater force has been allowed than in others to custom as compared with express legislation. The theory of English law is that no statute can become obsolete by desuetude. The contrary view is maintained in Germany, and even in Scotland.

Such an account of the growth of custom and its transformation into law will not content a certain school of theorists, of whom Savigny and Puchta are the most illustrious. They tell us that the growth of Law (*Recht*) has no dependence upon individual arbitrary will or accident.²⁶ It is begotten in the People (*Volk*) by the Popular intelligence (*Volksgeist*).²⁷ The People, however, has no actual existence apart from its bodily form, the State.²⁸ Law has its existence (*Daseyn*) in the general-will (*Gesammtwille*); customary observance is not the cause of Law, but the evidence of its existence.²⁹ It does not make its first appearance in the form of

²⁶ Savigny, *System*, i. p. 15.

²⁷ *Ib.* i. pp. 175, 177.

²⁸ Savigny, *System*, i. p. 22.

²⁹ *Ib.* i. pp. 35, 168. Cf. Windscheid, *Pand.* i. p. 40.

logical rules.³⁰ Or, going still further afield, we are told by Hegel to see in the rise of Law the evolution of the Deity.

We are in fact told that the principle is anterior to its applications. The true reply to which we conceive to be, that the principle is nothing else than a generalisation from the applications. The only unity antecedent to the circumstances is the common constitution of mankind. The element of truth in the view of the so-called 'historical school' of Germany is that the adoption of customary rules of conduct is unconscious. It takes place in accordance with no deliberate plan, but comes into being piece-meal, as it is called for by the natural wants of mankind. We may remark as results of its mode of formation, first, that it is hence better adapted to national feeling than law which is otherwise manufactured. Secondly, that its importance declines with the growth in a nation of conscious critical power. * * *

From Ratigan's Science of Jurisprudence, 13-20.

It is this element of enforcement by a sovereign political authority which, in the opinion of Austin and his followers, distinguishes the rule of law from all those other rules which like the principles of morality, and the so-called laws of honor and of fashion, are enforced by an indeterminate authority, as well as from all those rules which are enforced by a determinate authority, which is either, on the one hand, superhuman, or, on the other hand, politically subordinate.³¹ Rules of the former kind, established in an independent political community by the authority of its sovereign or supreme government, are called "positive laws."

But if we accept the limitation of laws, properly so called, to commands proceeding from a determinate source, we are not only led, as Professor Robertson remarks,³² to the apparent paralogism of admitting the by-laws of a private club, if made in pursuance of a legal right, to be laws, properly so called, while the whole mass of international jurisprudence is mere opinion, improperly called law,—a conclusion which is calculated to shock our sense of the proprieties of expression,—but we have a further difficulty to contend against. As applied to a political community answering to the modern notion of a

³⁰ Savigny, i. p. 16.

³¹ Jurisprudence, p. 38.

³² See article "Law" in Enc. Brit.

civilized state, in which legislation tends to become the only true source of new law, Austin's theory of resting the obligation of law upon the existence of political sovereignty is strictly accurate. But, before laws were thus made, there were, as Montesquieu remarks,³³ "relations of possible justice." And it was probably not within the range of Austin's knowledge that societies existed, notably in India, prior to the advent of British rule, in which human actions were undoubtedly governed by rules as absolute as any set by a political superior, but which, nevertheless, were not laws, within his conception of the term. To describe, however, such rules as mere rules of morality, would be to misunderstand their nature, and to misuse language. By those who are acquainted with the force of customary laws relating to inheritance, the alienation of property, the right to levy customary fees, or the use and partition of common waste lands as they exist, for instance, in village communities in the Punjab, the Austinian conception of law must be received with a distinct qualification,—a qualification which would limit its application to new laws in a civilized state of the modern type. Even the older written Hindu law would not strictly correspond with Austin's conception of a law, even if the system of penances for the breach of their precepts could be accepted as equivalent to the sanction of the political authority required by Austin. It is not, indeed, until we come to the comparatively late period of Manu's Institutes that we find any trace of even an ideal tribunal for the punishment of those who have transgressed the precepts of the written law; and the provisions which are contained in that book for the construction of a tribunal composed of the king, with learned Brahmins as assessors, were in all probability purely idealistic, and not taken from the actual administration of law in any Hindu kingdom which then existed. The character of Hindu jurisprudence is, in fact, altogether different from that of any of the European systems. The Hindu rishis, who composed the *samhitas*, had no temporal power; and the rules they prescribed did not, at their origin, owe their authority to the sanction of any temporal sovereign or administrator, but to the veneration in which the sages themselves were held. And one cannot but admire the practical good sense which these lawgivers showed in their manner of prescrib-

³³ Spirit of Laws, bk. 1, § 1.

ing rules. They did not profess to lay down arbitrary laws of their own invention. On the contrary, they assumed to compile their rules from the ordinances of the Vedas, which were represented as too vast to be mastered by ordinary mortals. The rishis only claimed to be the exponents of this divine law, eternal in its source and immutable in its character, or interpreters of the approved customs and usages of the past. And to this position they clung even when introducing the most radical reforms. They did not, by a stroke of the pen, seek to eradicate the barbarous institutions of a more primitive age. When they wished to abolish some prevailing practice or custom, they did not do so by an express injunction; but, by pretending to regulate the practice, they subjected it to so many conditions and ceremonial requirements as in reality to render its observance impossible. Thus it has happened that although these rishis were neither elected by the people, nor appointed by a political sovereign, to make laws, their precepts have continued to the present time to be generally obeyed as commands, and to retain the same vitality as they had in the old days of Brahminical ascendancy. It is also noteworthy, as further illustrating the worldly wisdom of these ancient Hindu lawgivers, that they recognized as a fundamental maxim that custom or usage was "transcendent law," and denounced a practice which, though legal, was abhorred by the world, as one that secured no celestial bliss, and was not fit to be followed. By such wise maxims the authors gave to their codes an elasticity which has not rendered them obsolete despite the lapse of centuries. So, again, the customary rules I have referred to were enforced, prior to the establishment of British power, not in consequence of any sanction, expressed or implied, of the dominant political authority for the time being, but in deference to that "plainest counsel of common sense," not to neglect the results of our predecessors' experience in a like matter.³⁴ In other words, from an inveterate regard for precedent, which exercises as great an influence in England and on the Continent at the present time as it ever did in India or in ancient Rome, and which was as much recognized and respected (or at least ostensibly so) by the Homeric gods on Olympus as it is now by the humble peasants of an agricultural village in the Punjab, who see in the practice and

³⁴ Pol. Jur. & Ethics, p. 52.

usages of their forefathers the guiding rule for their own conduct,—a rule which, by long familiarity, has come to be looked upon as the most natural one to observe, and therefore the right rule, to transgress which would shock the public sense of propriety. For usages and customs, no less than religions, undoubtedly descend by inheritance; and Lord Melbourne, although he may have incurred the ridicule of philosophers for saying that he should adhere to the English Church because it was the religion of his fathers, really only uttered, as Walter Bagehot aptly says,³⁵ one of the most firm and accepted maxims of old times, based upon that principle of ancestor worship which in early stages of society formulates as law the rule of the dead over the living. This rule is primarily concerned in regulating personal conditions only, and hence it is that the movement of progressive societies has been characterized by Sir Henry Maine as a movement from status to contract.³⁶ Succeeding generations follow the same rule, true to the imitative faculty which is the leading trait in the character of archaic peoples as it is of children, who live by what they see and hear, and cannot help imitating what comes before them. In course of time these inherited usages eventuate, as Herbert Spencer³⁷ observes, in a rigid set of customs, restraining men's action in a greater degree than could any rules having a more formal and artificial origin. But inasmuch as the construction of rules which will adequately sum up the general current opinion upon any given class of rights requires two distinct faculties,—the faculty of observation and the faculty of expression,³⁸—and these faculties are in a more or less undeveloped condition in communities still existing under primitive organizations, it naturally follows also that these inherited usages, crystallized into later customary laws, are, for the most part, restricted to matters of frequent occurrence in the community, and are handed down by tradition in the simplest possible forms.

Law, in fact, has its history, like every other science; and the most external characteristic in the process of its historical develop-

³⁵ *Physics & Politics* (5th Ed.) p. 99.

³⁶ *Ancient Law*, c. 5, p. 170.

³⁷ *Political Inst.* § 535, p. 535.

³⁸ Ihering, *Der Geist des Römischen Rechts*, 1, 28.

ment is that its provisions advance from original simplicity to greater complexity,—a process which goes hand in hand with the expansion of the relations and necessities of life, and therefore with the more manifold development of the material which reacts upon the law, and which law has to master and control.³⁹ Thus, law, as a branch of the national life, is never stable. It has no moment of absolute cessation, but it develops with the people, and attaches itself to the national character at its different stages of culture, adapting itself to the changing wants and requirements of the people.⁴⁰ As new legal principles manifest themselves, the law naturally undergoes change, and the most essential influence determining this process of change lies in the position which a people assumes as a member of the whole of mankind. In the absence of any legislative machinery, the immediate conviction of the people is necessarily the primary source of all law, and in the conviction that the prevailing usage is right lies the binding force of customary law.⁴¹ Now, this period of youth of nations, in which law exists, as we have seen, in the consciousness of the people, may be characterized as poor in ideas; but, as Savigny observes, it nevertheless enjoys a clear perception of its relations and circumstances, and feels and brings the whole of them into play. Customs may indeed appear from their gradual growth to arise spontaneously, and may be rarely traceable to premeditation; but Lorimer is unquestionably right in saying that “they must always have rested on a previous conception of an object to be attained and of the means of attaining it.”⁴² Nor is a custom ever a pure mistake. On the contrary, there is a close organic connection of law with the being and character of the people, which manifests itself also in the progress of the times, and is subject to the same movement and development as any other popular tendency. The progress in the formation of law accordingly keeps pace with the progress in the knowledge of the people of the facts which they observe,⁴³ and hence it is that law has its provincialisms

³⁹ Puchta, *Cursus der Inst.* (1st Ed.) § 19, p. 41: Leipzig, 1865.

⁴⁰ *Id.*, p. 40; Hastie, *Jur.* (1887) p. 57.

⁴¹ 1 Windscheid's *Lehrbuch des Pandektenrechts* (5th Ed.) § 15, p. 42.

⁴² 1 *Inst. Law Nat.* p. 28.

⁴³ *Trattato delle Leggi*, per l'Avv. Professore G. Saredo, p. 20: Fireny, 1886.

no less marked than language.⁴⁴ Thus it is that law grows with the growth and strengthens with the strength of a people.⁴⁵

The customary law thus gradually formed, the *jus non scriptum* (or unwritten law), becomes now the immanent rule of conduct which flourishes at its fullest in the youthful life of peoples and in the still undeveloped state. In its earliest beginnings its rules depend, doubtless, largely upon natural intuitions, increasing with the experience of what is useful and what injurious. Thus we may surmise that a long course of sufferings and deaths must have generated a body of direct usages to alleviate evil, and to promote good. But it was only by a very gradual process that such usages were molded into existence, and their extension in other directions was probably again marked by as slow a development as the transition from barbarism to civilization. So, for example, even what now seems to us the very simple knowledge of how to kindle a fire, or to cultivate the field, or to make bread, was probably only as slowly discovered as the respect due to the right of property, or the necessity of punishing evil doers. Gradually, however, the sphere of knowledge in the childhood of peoples widens and expands, the usages and practices of the past become sanctified by constant observance, and at length they are deemed to constitute a body of customary laws, the violation of which is at once an offense against the community and also against its tutelary deities.⁴⁶ And as in the case of language, so in that of customary law, the father gives the law to the family, the family to the tribe or clan, and the tribe or clan to the community. But in the process of formation those rules which directly, and irrespective of authority, conduce to social welfare, initiated by the consensus, as it has been termed,⁴⁷ of individual interests, precede the kind of law initiated by political authority. Equality is the essential principle of the former, as inequality of the latter. It is the coercive sense of ingrained usage in the former which, in early stages of social organisms, keeps men from thinking what they have not before thought, and from doing what they have not before done.⁴⁸

⁴⁴ Puchta, *Cursus der Inst.* § 10, p. 22.

⁴⁵ Sav. "The Vocation of Our Age," translated by Abraham Haywan, pp. 25, 27.

⁴⁶ *Filosofia del Diritto Privato*, per P. Cogliolo, pp. 25, 30.

⁴⁷ *Political Institutions*, by H. Spencer, p. 528.

⁴⁸ Bageh. *Eng. Pol. Econ.* p. 44.

We have thus seen where the weak point of the Austinian conception of law lies. But, viewed in its modern and matured development, we may very well accept Austin's definition of jurisprudence as the science of the positive law.

From Salmond's First Principles of Jurisprudence, 95-106.

The opinion that has been advanced in the preceding pages touching the nature of law differs considerably from that which has commonly found acceptance with English writers. The theory almost universally maintained in England is that a law is a command issued by the state to its subjects, and enforced by the power of the state, or, more concisely, that a law is a rule of action enforced or sanctioned by the state. The following are some of the more or less varying forms in which this conception has been expressed.

According to Hobbes: ⁴⁹ "A law is the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do."

Locke defines the civil law as "the rule set by the commonwealth to the actions of those who belong to it." ⁵⁰

According to Blackstone: ⁵¹ "Municipal law is a rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong."

According to Bentham: ⁵² "Every law, when complete, is either of a coercive or uncoercive nature. A coercive law is a command. An uncoercive, or rather a discoercive, law is the revocation, in whole or in part, of a coercive law. * * * Every coercive law creates an offense; that is, converts an act of some sort or other into an offense."

Austin says: ⁵³ "Every law or rule (taken with the largest signification which can be given to the term properly) is a command." And again: ⁵⁴ "Every positive law, or every law simply and strictly so called, is set by a sovereign person or sovereign body of persons

⁴⁹ Works 6, p. 26.

⁵⁰ On the Human Understanding, bk. 2, c. 28, § 9.

⁵¹ Commentaries I., 53.

⁵² Principles of Morals and Legislation, p. 330, Clarendon Press.

⁵³ Aust. Jur. (3d Ed.) p. 90.

⁵⁴ Id. p. 225.

to a member or members of the independent political society wherein that person or body is supreme."

Finally, Professor Holland⁵⁵ defines a law as "a general rule of external human action enforced by a sovereign political authority."

We have on two previous occasions incidentally considered this theory of law, and in two respects have made objection to it. We have seen, in the first place, that the conception of sanction or enforcement is not, as it is commonly considered to be, identical with that of punishment. We have seen that the latter is only one species of the former, and that a rule is sanctioned or enforced by the state whenever the force of the state is in any manner exercised in the maintenance of it.

A second objection already made is that this theory leaves altogether out of sight the ethical significance of law; that it empties the conception of its ethical content. We have seen that there is an intimate relation between natural rights, wrongs, and duties, and legal rights, wrongs, and duties, and that, if we deduce the theory of the latter from the bare conception of a law as a command of the state, this relationship is reduced to the level of a mere verbal coincidence. The truth is that the rules of action enforced by the state are, in theory at least, the rules of right and wrong. The administration of law is, in theory at least, the administration of justice. Law is justice speaking to men by the mouth of the state, though it must be admitted that the message is often sadly garbled in the process of transmission. Now, this relation between natural law and civil law must be recognized by any satisfactory theory of the latter; and for this reason we must prefer the definition of Blackstone, which recognizes the ethical element, to those of Bentham and Austin, which reject it. "Municipal law," says Blackstone in the passage already quoted, "is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."

Let us say, then, in view of these objections, that law consists of the rules of right and wrong enforced by the state. What is to be said for or against such a theory? Now, the fundamental objection is that, for the purposes of the science of jurisprudence,

⁵⁵ *Elements of Jurisprudence* (2d Ed.) p. 34.

the definition is too narrow. As the term is used by lawyers, although every rule of right recognized and enforced by the state is a rule of law, the converse is not true. The principles of right constitute merely one class of the principles of law. It is doubtless the most important class, since the whole aim and purpose of law is the maintenance of right. Yet there are many rules of law which cannot, from any reasonable point of view, be regarded as rules of right. This limitation of the term "law" is both unnecessary and inconvenient. It is not rendered necessary by any inconsistency or obscurity in the ordinary and wide use of the term; and, if we wish a distinct term to express a particular class of rules of law, we should use the generic name with the necessary qualification, rather than narrow such generic name into a specific one.

We shall hereafter have occasion to deal more at length with the classification of rules of law, but in the meantime we may observe that in addition to rules distinguishing between right and wrong, or defining rights and wrongs, the law contains (1) rules defining the remedies to be applied to wrongs; (2) rules defining the conditions on which, and the manner in which, remedies are to be applied to wrongs; and (3) rules relating to the existence, application, and interpretation of legal rules themselves.

Now, every rule in each of these three classes falls within the definition of a rule of law here maintained, while not one of them is a rule of law in the sense of a principle of right, or rule of action, enforced by the state. For example, that murder is a crime is, of course, a rule of law, in this latter sense. But what of the related rule that hanging is the punishment for murder? This is unquestionably a rule of law in the ordinary acceptation of the term, but in what sense is it a rule of action enforced by the state? The difficulty cannot be escaped by combining into one the rule declaring the wrong and that declaring the remedy, for the two are perfectly separable, and only one of them falls within the definition. Hobbe and Bentham attempt to avoid the difficulty by regarding the rule establishing the remedy as a command addressed, not to the ordinary subjects of the state, but to the judges whose duty it is to enforce the rule establishing the wrong. "A law," says Bentham,⁵⁶

⁵⁶ *Principles of Morals and Legislation*, p. 331, Clarendon Press.

"confining itself to the creation of an offense, and a law commanding a punishment to be administered in case of the commission of such an offense, are two distinct laws, not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different. The persons they are addressed to are altogether different. Instance, 'Let no man steal,' and 'Let the judge cause whoever is convicted of stealing to be hanged.'" ⁵⁷

But this position is untenable. No delegation of its judicial functions by the state to subordinate judicial officers is essential. So far as the mere theory of the administration of justice is concerned, there is nothing to prevent the sovereign (whether a single person or a body of persons) from administering justice in person, instead of through the judges. And, even where there is a delegation of judicial functions, it is by no means necessary that the judges should themselves be answerable to the law for their due performance of their duties. Can it be contended, then, that where there is no delegation of judicial functions to subordinate officers of state, or where such officers are not amenable to the law, rules defining the remedies to be applied to wrongs cease to be rules of law? Can it be contended that the proposition, "Death is the punishment for murder," amounts to a principle of law only when it can be construed as a command addressed to the judges to inflict that punishment? The idea of coercion, authority, or sanction forms indeed an essential element in the idea of legal duty, but is totally irrelevant to that of a rule of law. When, as is generally the case, the state delegates its judicial functions, it may render its servants, the judges, legally responsible for the due performance of those functions in accordance with the prescribed rules. But these rules are rules of law because they are, as a matter of fact, acted on, not because the judges are bound by legal sanctions to act upon them.

The second class of rules of law that do not fall within the definition now under consideration consists of rules of procedure,—rules,

⁵⁷ So, also, Hobbes, distinguishing between distributive and penal laws (*Leviathan*, c. 26): "Distributive are those that determine the rights of the subjects, * * * and these speak to all the subjects. Penal are those which declare what penalty shall be inflicted on those that violate the law, and speak to the ministers and officers ordained for execution."

that is to say, which do not constitute or define either wrongs or remedies, but define the manner in which, and the conditions on which, remedies are applied to wrongs. Such rules of procedure are in no intelligible sense rules of conduct enforced by the state. Take, for example, the rules that hearsay is no evidence; that written evidence is superior to verbal; that a contract for the sale of land cannot be proved by verbal evidence; that judicial notice will be taken of such and such facts; that matters once decided are, as between the parties, decided once for all; that the interpretation of written documents is the office of the judge, not of the jury; that witnesses must be examined on oath or affirmation. Is it not plain that these are rules in accordance with which the judges administer justice, to the exclusion of their personal discretion,—not rules of action appointed by the state for observance by its subjects, and enforced by legal sanctions?

There are two arguments that may be used to bring such rules of procedure within the definition now impeached. The first of these we have already sufficiently considered,—the argument, namely, that such rules differ from rules of substantive law only in being addressed to a different class of persons; the latter being addressed to the ordinary subjects of the state, the former to the judges. The second argument is that rules of procedure are in reality rules laid down for the guidance of litigants, and differ from rules of substantive law merely in the fact that their sanction consists, not in ordinary punishment, but in the failure of the disobedient litigant to obtain the remedy which he claims, or to establish the defense which he sets up. Thus, in this view, the rule that hearsay is no evidence is in truth a command addressed by the state to all litigants, not to adduce such evidence in support of their claims; and the penalty attached to such command is the rejection of such evidence, if offered, and the possible defeat of the litigant in consequence of such rejection. Now, in the first place, even if all rules of procedure were capable of being transformed in this manner, this is a most perverse and unnatural method of regarding them. The fact that it is possible for a man to stand on his head is no sufficient justification for a description of him as an animal adopting that attitude. To regard the failure of a litigant to prove his case as a penalty inflicted on him for his failure to observe the rules of evidence is to force into such rules a meaning

which, as a matter of fact, they do not bear. A plaintiff is nonsuited, not as a punishment for his failure to adduce legal evidence, but simply because, in the eye of the law, his case has not been proved. The injury sustained by a litigant who adopts a mistaken procedure is in no other sense the sanction of a rule of procedure than that in which the broken leg that results from a fall is the sanction of the law of gravitation.

In the second place, it is not even possible so to twist every rule of procedure into the semblance of a rule of action enforced by the state. If any one doubt this, let him try the experiment on the rule that judicial notice is taken of certain facts, or on the rule that the interpretation of documents is the function of the judge, or on the rule that witnesses must be examined on oath, or on the rule that the verdict of a jury must be unanimous.

It will be sufficient merely to mention the third class of rules that do not fall within the definition which we are considering. They are rules relating to the existence, application, and meaning of other rules,—a class respecting which we shall have more to say hereafter. It would require great ingenuity to transform a general principle as to the interpretation of statutes into the shape of a rule of action enforced by the state.

We see, then, that every rule of law is not a rule of conduct. But, furthermore, not every law that is a rule of conduct is one enforced or sanctioned by the state. I refer to what may be termed “permissive rules of action.” By a “permissive rule” is meant a rule declaring certain conduct not to constitute a wrong,—a rule, for example, declaring that witchcraft or heresy is no crime, or that damage done by ordinary competition in trade is no cause of action. It cannot be denied that these are “rules of law,” in the sense in which that term is ordinarily used, and it is plain that they fall within the definition of a rule of law as a rule acted on by the state in the administration of justice. But in what sense are they enforced by the state? They are not commands, but permissions. They define liberties, not rights. It cannot be said that they are in truth rules prohibiting any interference on the part of others with those who perform, or wish to perform, the actions so declared to be allowable. For in fact this is not their meaning. The rule that heresy is no crime does not mean that it is a wrong for any one to prevent or interfere with the expression

of heretical opinions, though it may be accompanied by a rule to that effect. It means that the state will not punish any one holding or expressing such opinions.

Neither can it be said that such permissive rules may and ought to be disregarded and treated as nonexistent, on the ground that it is quite sufficient to declare what conduct is prohibited; without also declaring what conduct is allowed. If we remember that the administration of justice is not governed solely by law, but partly likewise by judicial discretion, the fallacy of this argument becomes apparent. It does not follow that, because by a fixed rule of law certain kinds of conduct are declared to be wrong, all other conduct is therefore allowable. Some other conduct may be declared by permissive rules of law to be right, and the residue may fall within the province of judicial discretion. Hence the necessity of permissive as well as of imperative rules of law. That certain conduct amounts to negligence is an imperative rule of law; that certain conduct does not amount to negligence is a permissive rule of law. But there are many species of conduct to which, in this respect, neither an imperative nor a permissive rule is applicable, and which are left to judicial discretion.

§ 5. General and Particular Commands.

From Austin's Jurisprudence, §§ 29-30.

Commands are of two species. Some are laws or rules. The others have not acquired an appropriate name, nor is there any short expression which will mark them precisely. I must therefore note them as well as I can by the ambiguous and inexpressive name of "occasional or particular commands." The distinction may, I think, be stated in the following manner:

By every command, the party to whom it is directed is obliged to do or to forbear.

Now, where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances specifically or individually, a command is occasional or particular.

For instance, if you command your servant to go on a given errand, or not to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week

or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specifically determined or assigned.

But if you command him simply to rise at that hour, or to rise at that hour always, or till further orders, it may be said with propriety that you lay down a rule for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders would be called a "general order," and might be called a "rule."

If parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule; a kind or sort of acts being determined by the command, and acts of that kind or sort being generally forbidden. But an order issued by parliament to meet an impending scarcity, and stopping the exportation of corn then shipped and in port, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances enjoined by the command would be determined specifically or individually by the determinate nature of their subject.

Again, an act which is not an offense, according to the existing law, moves the sovereign to displeasure; and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

To conclude with an appropriate example, judicial commands are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now, the lawgiver determines a class or description of acts, prohibits acts of the class generally and indefinitely, and commands, with the like generality, that punishment shall follow transgression.

The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment as the consequence of a specific offense.

The distinction immediately above stated and illustrated does not, indeed, accurately square with established forms of speech. For instance, an order by parliament stopping the exportation of corn then in port would very likely be called a law, because it wears the form of law, and is issued by the sovereign legislature. An act of attainder deliberately passed by a parliament, with the forms of legislation, would probably be called a law, though a similar order made by a sovereign monarch, without deliberation or ceremony, would be styled an arbitrary command. And, on the other hand, there are many commands, issued by way of delegated legislation, which really are laws, although not called so by common language. Such are various orders in council, orders issued by public departments; schemes of the charity commissioners, when duly laid before parliament; orders or rules made under powers given in acts of parliament relating to judicial procedure, or otherwise made in exercise of delegated legislative functions.

According to the line of separation which I have attempted to describe, a law and a particular command are distinguished thus: Acts or forbearances of a class are enjoined generally by the former. Acts determined specifically are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to them, a law and a particular command are distinguished in the following manner: A law obliges generally the members of the given community, or persons of a given class. A particular command obliges a single person, or persons individually.

This is not a correct account of the distinction.

For, first, commands which oblige generally the members of the given community, or persons of given classes, are not always laws or rules.

Thus, in the case already supposed,—that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained,—the command is obligatory upon the whole community; but, as it obliges them only to a set of acts individually assigned, it is not a law.

And, secondly, a command which obliges exclusively persons indi-

vidually determined may amount, notwithstanding, to a law or rule.

For example, a father may set a rule to his child or children; a guardian, to his ward; a master, to his slave or servant. And certain of God's laws were as binding on the first man as they are binding at this hour on the millions who have sprung from his loins.

Again, suppose that parliament creates and grants an office, and binds the grantee to services of a given description; this would be a law established by political superiors, and yet exclusively binding a specified or determinate person.

From Ratigan's Science of Jurisprudence, 11-12.

For the mere student, it is immaterial whether the law arose, as Grotius contends, from a social instinct (or appetitus societatis), or from a fear of a war of all against all (bellum omnium contra omnes), as Hobbes maintains, or from a desire of happiness, according to Thomasius, or from a craving after perfection, as Wolff thinks. It is sufficient for his purpose to know that law develops itself *pari passu* with the notion of authority, which naturally inspires a respect for it.⁵⁸ The question, indeed, what is law? can only be likened, as Bluntschli observes, to that larger and more celebrated question, what is truth? and no completely satisfactory answer is perhaps possible. But the fundamental notion which is now generally accepted as underlying the idea of law in jurisprudence, and which is sufficiently exact to enable us to construct our science, is that of "a rule which, in the complex relations of society, is required to regulate the actions of the individual members."⁵⁹ Or, expressed in the terser and more technical language of Professor Holland, a law, in the proper sense of the term, that is to say, as applied to law prevailing in a modern state as first conceived by Bodin and a century later by Hobbes, is "a general rule of external human action enforced by a sovereign political authority."⁶⁰ Some writers add to this definition that the rule must be permanent. But if by this expression it is meant that the rule must be perpetual, as Suarez seems to think, although he hastens to explain that he only means perpetual in a negative sense,—that is to say, as excluding a rule established *ad certum ac defini-*

⁵⁸ *La Filosofia del Diritto*, per Professor Giovanni Abate Longo (1885) p. 54.

⁵⁹ *The Nature of Positive Law*, p. 269.

⁶⁰ *Jurisprudence*, p. 37.

tum tempus (for a fixed and definite time),⁶¹—the addition would not be in harmony with actual practice; for there are many general rules enforced by a sovereign political authority which are only enacted for a fixed and definite time, which are nevertheless laws in the truest sense of the expression. Thus, for example, an income tax may be introduced, as it was in India, for a specified time.⁶² During this limited period the will of the legislature would undoubtedly have the force of a law. If, on the other hand, the term “permanent” is only intended to imply that the rule ought to be stable,—that is to say, that it shall receive a general application for a period more or less long,—the addition is not necessary; for a command that vanishes the moment it has been obeyed once cannot be correctly spoken of as a “rule,” which of itself implies that which is prescribed as a guide to conduct or action, and having a certain duration.⁶³ It involves, in short, the idea of repetition or recurrence.

⁶¹ De Legibus, 1, x.

⁶² Vide section 249 of Act 32 of 1860, which was to continue in force from the 31st July, 1860, until the 1st August, 1865, and no longer.

⁶³ Les Principes Fondamentaux du Droit, par Le Comte Vareilles Sommieres (Paris, 1889) pp. 9-12.

CHAPTER II.

THE SCOPE OF LAW.

From Amos' Science of Law, 13, 14.

In order to ascertain what are the materials of the science of law, it will be well to cast a glance at the subject-matter, in its rudest and most inartificial shape, to which the science relates. For this purpose the case may be taken of a nation in what may be called the "early manhood" of its life, after all the early struggles for its self-conscious existence or for its independence are over, and yet before it has developed within itself all the complicated machinery of a highly-organized commercial and social life. In such a state there must, by the very hypothesis, be a more or less steadily fixed government, whether that government approach more to a monarchical or an aristocratical or a democratical type. The stability of the state and its self-dependence imply agriculture, and agriculture implies property or ownership. The division of labor, again, which this economical condition presupposes, involves the habit of making contracts, even though they be of the most elementary form. The social condition cannot but rest upon a previously developed, though now strongly fortified, domestic condition; and this implies the fact of marriage, and the relations of husband and wife, parent and child, brother, sister, uncle, aunt, nephew, niece, and the like. The still remaining anarchical tendencies of certain individual members of the state, lagging behind the rest, will generate occasional acts of violence, threatening, directly or indirectly, the very life and existence of the state. These acts will excite the horror of all the more orderly members of the community, and will be denominated by some such term as "crimes."

It is obvious that the characteristic classes of facts which have just been alluded to are so general and simple that their necessary occurrence at a certain epoch in the progress of every state may be predicted as a certainty. These facts, however, in themselves, are of the utmost possible moment, and involve, by their permanence and universality, the elementary ingredients of a science of law.

It will be seen that these facts, looked upon as a whole, imply,

first, a certain number of definite relations of persons to one another, whether as governors or governed, husbands or wives, parents or children, or as otherwise allied by blood or marriage. Secondly, these facts involve certain determinate relations between the persons in the community, in respect of the things (or physical substances) appertaining to the community as a whole. These things severally are owned by one or another, and not by the rest. The ownership of these things is the subject-matter of private arrangements and contracts between different members of the community. The violent or fraudulent abstraction of a thing owned from the owner may be one of the acts on the general prevention of which the very life of the community is held to depend, and, as such, is denominated a "crime."

Again, the classes of facts already enumerated have two distinct sides to them,—one touching the outward lives of members of the community, that is, their acts; the other touching their inward lives, that is, their thoughts and feelings. Over the former of these sides the whole of the community can, by its aggregate pressure, exert a considerable amount of force, of a specifically ascertained quantity and quality. Over the latter side, that touching the thoughts and feelings of individual members, the utmost direct pressure consciously exerted by the community is of the feeblest efficacy, and, at the best, indefinite and precarious in the highest degree. The sphere of action of the community with respect to the former, or the acts of men, is that of law. The sphere of action with respect to the latter, that is, the thoughts and feelings, though not exclusive of acts, is morality. * * *

From Pollock's A First Book of Jurisprudence, 44-47.

In assuming a scientific character, law becomes, and must needs become, a distinct science. The division of science or philosophy which comes nearest to it in respect of the subject-matter dealt with is ethics. But, though much ground is common to both, the subject-matter of law and ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relation of citizens to the commonwealth and to

one another. And, inasmuch as human beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual.

The possible coincidence of law with morality is limited, at all events, by the range which theologians have named "external morality." The commandment, "Thou shalt not steal," may be, and in all civilized countries is, legal as well as moral. The commandment, "Thou shalt not covet," may be of even greater importance as a moral precept, but it cannot be a legal one. Not that a legislator might not profess to make a law against covetousness, but it would be inoperative unless an external test of covetousness were assigned by a more or less arbitrary definition; and there the real subject-matter of the law would be not the passion of covetousness, but the behavior defined as evincing it. The judgment of law has to proceed upon what can be made manifest, and it commonly has to estimate human conduct by its conformity or otherwise to what has been called an "external standard." Action and intent shown in acts and words, not the secret springs of conduct in desires and motives, are the normal materials in which courts of justice are versed, and in the terms of which their conclusions are worked out and delivered. With rare exceptions, an act not otherwise unlawful in itself will not become an offense or legal wrong because it is done from a sinister motive; nor will it be any excuse for an act contrary to the general law, or in violation of any one's rights, to show that the motive from which it proceeded was good. If the attempt is made to deal with rules of the purely moral kind by judicial machinery, one of two things will happen: Either the tribunal will be guided by mere isolated impressions of each case, and therefore will not administer justice at all; or (which is more likely) precedent and usage will beget settled rule, and the tribunal will find itself administering a formal system of law, which in time will be as technical and appeal as openly to an external standard as any other system. The process took place on a great scale in the formation of the canon law, and on a considerable scale in the early history of English equity jurisdiction.

Besides and beyond the limitation of the field of law to external conduct, there are many actions and kinds of conduct condemned by morality which, for various reasons, law can either not deal with at

all or can deal with only in an incidental and indirect manner. It would be the vulgarest of errors (as we have already hinted) to suppose that any kind of approval is implied in many things being left to the moral judgment of the community, and to such pressure as it can exercise. Law does not stand aside because lawgivers or judges think lightly of such things, but because, whether from permanent or from transitory causes, the methods of legal justice are not appropriate for dealing with them, and the attempt to apply those methods would, so far as it could be operated at all, probably do more harm than good. At the same time, rules of law may well have, in particular circumstances, an effective influence in maintaining, reinforcing, and even elevating the standard of current morality. The moral ideal present to lawgivers and judges, if it does not always come up to the highest that has been conceived, will at least be, generally speaking, above the common average of practice. It will represent the standard of the best sort of citizens.

From Salmond's First Principles of Jurisprudence, 160-171.

We have seen that a legal wrong is an action recognized by the law as hurtful, and therefore as calling for the application of a legal remedy. It must now be more particularly noticed that not every act which is hurtful in fact is recognized and remedied as such by law. There is merely an imperfect coincidence between the spheres of things hurtful in fact and things hurtful in law, the sphere of the latter being smaller than, and included in, that of the latter. This distinction is expressed in the technical language of English lawyers by the pair of contrasted terms "damnum" and "injuria,"—the former comprising that which is hurtful in fact; the latter, that which is wrongful in law. The space throughout which the sphere of the former fails to coincide with that of the latter, is the domain of what is technically known as "damnum sine injuria"; and the object of the present chapter is a brief examination of some of the most important cases in which hurt or damage is thus sine injuria, and no ground of legal liability.

That, in respect of good and evil, the general may differ from the particular consequences of an act, and that an act is to be judged as right or wrong from its general, not from its particular, results, are facts which we have already had occasion to notice. The pur-

pose of the administration of justice is to put down that which is absolutely evil, not that which is merely relatively so; and hence there results an important instance of *damnum sine injuria*. There are many acts which in respect of their particular consequences are the cause of *damnum*, although in respect of their general results such *damnum* is *sine injuria*. Thus, the special result of competition in trade may be ruin to individual traders, but the general result is a gain to society at large. Hence such competition, though hurtful to individuals, is not wrongful.

In the class of cases just mentioned, the hurtful act is neither a natural nor a legal wrong. The exemption from liability is recognized both by natural and by civil law. This, indeed, is the only case of *damnum sine injuria* allowed by natural law; for every act which in its general consequences is harmful is, by the very definition, a natural wrong. In the case of civil law, however, it is otherwise; for there are many natural wrongs which are not legal wrongs, and many reasons for refusing to treat an act as wrong for the purposes of the administration of justice, though it is wrong in truth. Wherever one of these reasons operates, we have an instance of *damnum sine injuria*,—a break in the coincidence of the spheres of natural and legal wrong.

As an example of the reasons for treating as innocent in law acts which are wrongs in fact, we may take the smallness of the damage caused by the act in question. Proceeding on the maxim, "*De minimis non curat lex*," the law winks at many a wrong on the ground that it is so slight that the legal remedy would be worse than the disease. Another instance is difficulty of proof, for a wrong that cannot be proved is in the eye of the law non-existent. "*De non existentibus et de non apparentibus eadem est ratio*." These and such like instances are, however, of merely practical importance; and there remains for consideration a case of *damnum sine injuria* which is of considerable theoretical interest. This we shall now proceed to examine.

Every act is the cause of an infinite series of consequences. Now, the law never has regard to the whole of this series in estimating the character of the act as right or wrong, but looks only at a particular portion thereof, connected with the act in a particular manner, and decides according to the hurtful or harmless nature of

that portion. It follows that all detrimental consequences that fall outside that part of the series, and are not connected with the act in the required manner, fall within the sphere of *damnum sine injuria*. On what principle, then, is the line drawn between those harmful consequences which do and those which do not render the act wrongful in the eye of the law? What is the bond of connection (beyond that of mere causality) between an act and its consequences, which is required to render the actor legally responsible for those consequences? In answering this question, we must bear in mind that the legal remedies applied to wrongs are of two kinds, namely, punishment and redress; and we must discuss the matter separately with respect to each of these remedies. For the principle adopted in the case of the one is not, necessarily, that adopted in the case of the other. A mischievous consequence may be a ground of liability with respect to one of these remedies, and not with respect to the other.

The object of punishing wrongdoers is to make men afraid of wrongdoing. Now, a wrong being an act followed by harmful consequences, it is clear that no man can be deterred by fear from committing a wrong, unless he either foresees those harmful consequences, or might foresee them by taking thought. So far, therefore, as the remedy of punishment is concerned, all those harmful consequences of which the doer has neither actual nor potential foresight fall, in a rational system of law, within the sphere of *damnum sine injuria*.

With respect to foresight, damage is of three kinds: (1) It may be actually foreseen, in which case the wrong is said to be willful or intentional. (2) It may be merely potentially foreseen, in which case the wrong is said to be due to negligence. (3) Or, lastly, it may be neither actually nor potentially foreseen, in which case it is said to be due to inevitable accident, and is no ground of liability. It is accidental, inasmuch as it is not intended; inevitable, inasmuch as it is not due to negligence.

With respect, therefore, to the remedy of punishment, we have carefully to distinguish between intention, negligence, and inevitable accident ("*dolus*," "*culpa*," and "*casus*"); the two former being grounds of liability, the last being a ground of exemption from liability. "*Actus non facit reum nisi mens sit rea*."

The only portion of the foregoing analysis that calls for any special examination is the notion of negligence. A negligent wrong, I have said, is one in which the damage is merely potentially foreseen, as opposed to an intentional wrong, in which it is actually foreseen. Damage is potentially foreseen when it would have been foreseen had the actor taken thought or care, instead of being thoughtless or careless; had he been alert, circumspect, or vigilant, instead of being in a state of mental indolence or drowsiness. It is this failure to take thought or care, to keep open the eyes of the mind, to be mentally active, that is called "negligence."

This, indeed, is not quite a complete account of the matter, for it is plain that both intention and negligence, both actual and potential foresight, may exist in various degrees, and not every degree is sufficient for legal liability. Thus, actual foresight of damage may vary from absolute certainty that such damage will ensue, through the various degrees of probability, down to a knowledge of the mere possibility of such damage. But in every system of law it must attain a certain degree or standard before it constitutes a ground of liability. By every system of law, men are allowed knowingly to expose their fellows to a certain amount of danger; for, if the risk is small, it may be expedient to disregard it, in view of the advantage otherwise derivable from the dangerous form of activity. A man is not liable for homicide because a fatal explosion takes place in his powder mill, though he established and carried on the industry with full knowledge of its dangerous character. Foresight of harm does not exist in the necessary degree.

Turning from intention to negligence, it is obvious that the amount of thoughtfulness or care required to make future damage visible—to turn potential into actual foresight—is not the same in all cases, but varies within wide limits. Now, the law does not demand the utmost degree of thoughtfulness, care, circumspection, or mental activity of which human beings are capable. In other words, just as in the case of intentional wrongs it is not sufficient for liability that foresight should have existed in ever so slight a degree, so in the case of negligence it is not sufficient for liability that a possibility of foresight should have existed in however slight a degree. Such potentiality, to be a ground of liability, must at-

tain to a certain standard. The standard of care adopted in ordinary cases by English law is the care that would be taken under the circumstances by an ordinarily prudent and benevolent man. All damage which could not have been foreseen without a degree of mental alertness exceeding this standard falls, in general, within the sphere of *damnum sine injuria*.

Negligence, then, is that degree of thoughtlessness which is the necessary condition of liability for the unforeseen consequences of an act. But we have here to notice an ambiguity in the meaning of the term, which has been the occasion of considerable obscurity and diversity of opinion in this portion of legal theory. As we have hitherto used it, the term "negligence" expresses a certain state of mind, and implies a hurtful act accompanying it. But, naturally enough, this relation between the application and the implication of the term is often reversed, and negligence then expresses the act and implies the accompanying state of mind. In the former sense it means thoughtlessness; in the latter it means harmful conduct resulting from thoughtlessness. In the former sense negligence is a condition of liability; in the latter it is a species of wrong.

Now, so long as we recognize the fact that the complex notion expressed by the term "negligence" includes, when viewed in its totality, both a certain species of conduct and a certain state of mind, it matters little which of these elements we regard as directly denoted by the term. This is merely a matter of convenience, and, so long as no confusion results, there is no reason why we should not use the term in both senses.

But it must not be forgotten that, even when negligence is used as the name of a species of conduct, it at the same time necessarily implies an accompanying state of mind. The definitions of negligence commonly accepted by English lawyers throw this mental element so much into the background that it is apt to be lost sight of altogether, and, indeed, some legal writers go so far as to deny its existence. Negligence, it is said, is conduct different from that of a prudent or reasonable man. There is not a word here as to the state of the person's mind; yet a slight analysis of the definition will show that the mental element is necessarily involved in it. The conduct which we expect from a prudent man is prudent con-

duct. Negligence, therefore, is imprudent conduct; that is to say, conduct unaccompanied by a certain measure of circumspection and resulting foresight of consequences.

In view of the fact that wrongs of negligence are unquestionably opposed to intentional wrongs, and that intention is a state of mind, it is impossible to deny that negligence, if it does not actually denote a state of mind, at least implies it.¹

It is only with respect to the remedy of punishment that intention or negligence, actual or potential foresight of consequences, is essential to liability. The application of the remedy of redress, as such, knows of no such limitation. But we must here recall the distinction formerly adverted to, between that species of redress which is rational and justifiable per se and that species which can be justified only so far as it operates as punishment; the distinction, that is to say, between perfect and imperfect redress. An example of the former kind is the enforcement of the payment of a debt; an example of the latter is the enforcement of compensation for personal injuries inflicted. Now, since the latter form of redress is justifiable only as being a form of punishment, it follows that it is subject to the same restrictions as the remedy of punishment. And, consequently, the maxim is applicable, "*Actus non facit reum nisi mens sit rea*." The existence of intention or negligence is a condition of liability. On the other hand, in the case of that form of redress which is justifiable per se, the distinction between intention, negligence, and accident is entirely immaterial. I am liable to make good damage done by me, not because I foresaw or might have foreseen it, but because it is such as admits of being made good. If I take property that does not belong to me, it is a very good reason for not punishing me that I believed it to be my own, and had no means of discovering my mistake; but this is no reason at all for not compelling me to return the property to its owner.

It must now be observed that there is in legal theory no such thing as *injuria sine damno*. In the theory of the law, every legal

¹ I have myself, in my "Essays in Jurisprudence and Legal History" (page 143), expressed the opinion that negligence is not properly regarded as a state of mind; but, on further consideration, I have come to the conclusion set forth in the text.

wrong is also a natural wrong, for there is no reason for treating an act as hurtful and wrong unless it is so in reality. Hence every legal wrong consists of two elements, namely, an act and harmful consequences resulting from that act. Now, to this a plausible objection may be made. It may be said: "It is not true that damage is always essential to a cause of action. In most cases the act itself constitutes the wrong, not the act plus consequential damage. For example, if I break a contract made with my neighbor, I commit a wrong, and am liable accordingly, even though he suffers no loss thereby, but is rather a gainer. In an action for nondelivery of goods sold, it is no defense that the price has fallen since the contract was made, and that the plaintiff has therefore profited instead of having lost by the breach. So, if I walk across another man's field, I am liable for a trespass, though I harm him not a whit. In other cases, on the other hand, such as that of slander, the act itself is not wrongful, unless followed by damage. It is plain, therefore, that wrongs are divisible into two classes, according as damage is or is not an essential element; and therefore we cannot define a wrong as an act followed by damage."

But the objection is based on a misapprehension. The true distinction is not between cases in which damage is and cases in which it is not necessary, but between cases in which damage must be proved and cases in which it is presumed by law to exist. In a very large number of cases the law itself takes notice that certain acts are followed by hurtful consequences. In such cases, therefore, it is sufficient to prove the act alone; proof of damage being relevant with respect to the amount of compensation recoverable, but not with respect to the existence of a cause of action. In other cases the law makes no presumption as to the consequences of acts, and, if any one complains of wrong, it lies upon him to prove, not only an act, but damage resulting therefrom. Thus, if A. breaks his contract with B., it is not necessary for B. to prove that he was thereby disappointed in his reasonable expectations or otherwise suffered loss, for the law takes notice that breach of contract is an act entailing hurtful consequences. If, on the other hand, I am negligent, I am not deemed guilty of any wrong until it has been proved that my negligence has been the cause of damage, for the

law does not regard negligence as necessarily entailing hurtful consequences. Although, therefore, wrongs differ as to the necessity of proof of damage, they are at one as to the necessity of its existence. In the words of Lord Holt:² "Every injury imports a damage, though it does not cost the party one farthing." *Damnum* is *sine injuria* many a time; *injuria* is *sine damno* never.

² *Ashby v. White*, *Ld. Raym.* 955.

CHAPTER III.

DIVISIONS OF LAW.

- § 1. Public and Private Law.
2. Written and Unwritten Law.
3. The Law of Persons and the Law of Things.
4. Civil and Criminal Law.
5. Law and Equity.
6. Substantive and Adjective Law.

§ 1. Public and Private Law.

From Markby's Elements of Law, §§ 291-295.

Whenever people have attempted to write systematically about law, certain divisions of it have been adopted, not always identical, but running mostly on the same lines.

The best-known and most widely accepted of these divisions of law is that which separates law into public and private.

There has been much said about this division, which seems to proceed upon the assumption that the division is a scientific one, based upon some principle which can be accurately stated and applied. Austin has, I think, clearly shown that there is no such principle, and that the division is not of that character.¹ It is only a convenient method of arranging the topics of law for the purpose of discussion. This is how it is put forward in the place where it originally appeared, namely in the Institutes of Justinian: "Jus publicum est quod ad statum rei Romanæ spectat, jus privatum quod, ad singulorum utilitatem pertinet."² All I understand to be meant by this passage is this: Public law is that portion of law in which our attention is mainly directed to the state; private law is that in which it is mainly directed to the individual. I do not think it means that these topics are capable of exact separation; but that our attitude changes in regard to them. And, according as we assume the one attitude or the other, we call law public or private.

The fact that this classification has been used for more than a

¹ Lect. 44, p. 770.

² Inst. I. 1, 4.

thousand years testifies to its convenience: and if it is unscientific, this, though it is a fact which it is desirable to remember, does not render it incumbent upon us to discard this division. I may also observe that, though the principle of the division may not be more accurate than I have stated, there has been very little practical difference of opinion as to what branches of law should be placed in each department; and such differences as have existed have been by no means important.

If the view that I take of the distinction is correct, it would obviously be a waste of time to discuss at any length the various attempts that have been made to explain accurately the distinction between public and private law. I will, however, notice one of those attempts, being that which has been most generally accepted as successful. It is said that public law comprises that body of law in which the people at large, or, as it is sometimes put, the sovereign, or the state as representing the people, is interested; whilst private law comprises that body of law in which individuals are interested. This is a forcible, and sometimes a useful, way of putting the distinction. But it is still not accurate. For, though the interest of the public is in public law conspicuous or predominant, there is hardly any law in which the interest of individuals is not also concerned. And so, also, in private law. The interest of the public may be in the background, but it is almost always there. Thus the criminal law of theft *ad statum rei publicæ spectat*, and is always classed as public law, but still private rights are largely concerned in it. So with the law of contract. Here we have to deal mainly with matters of private concern, but the legality of the transaction—in other words, the public concern in it—is not forgotten. So the criminal law of trespass and the civil law of trespass to a considerable extent effect the same objects, though in one the public interest and in the other the private interest is chiefly regarded.

From Holland's Elements of Jurisprudence, 116–118.

The field of law, strictly so called, may be thus exhaustively divided between the law which regulates rights between subject and subject (*civis and civis*) and that which regulates rights between the State and its subjects (*civitas and civis*). But there is a third

kind of law which it is for many reasons convenient to co-ordinate with the two former kinds, although it can indeed be described as law only by courtesy, since the rights with which it is concerned cannot properly be described as legal. It is that body of rules, usually described as International law, which regulates the rights which prevail between State and State (*civitas* and *civitas*)³.

The differences between these three kinds of Law, Private, Public, and International, depend upon the presence or absence of an arbiter of the rights of the parties.

In Private law, which in many respects is the only typically perfect law, it will be observed that both the parties concerned are private individuals, above and between whom stands the State as an impartial arbiter. In Public law also the State is present as arbiter, although it is at the same time one of the parties interested. But in International law there is no arbiter at all, but both parties are equally judges in their own cause. The law where a political arbiter is present, be he, or be he not, identical also with one of the parties, is often called 'Municipal,' to distinguish it from the so-called law which is described as 'International,' and which has no arbiter to which it can appeal other than the opinion of the civilised world.

It is plain that if Law be defined as we have defined it, a political arbiter by which it can be enforced is of its essence, and law without an arbiter is a contradiction in terms. Convenient therefore as is on many accounts the phrase 'International law,' to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilised world, nations are expected to act, it is impossible to regard these rules as being in reality anything more than the moral code of nations.

³ A statement remarkable for its date as to the nature of International law is to be found in Hooker's Ecclesiastical Polity, i. c. x. § 12: 'Besides that law which simply concerneth men as men [morality] and that which belongeth unto them as they are men linked to others in some political society [municipal law], there is a third kind of law which toucheth all such several bodles politic, so far as one of them hath public commerce with another. and this third is the law of Nations.' Montesquieu distinguishes 'droit civil,' 'droit politique,' 'droit des gens.' Esprit des Lois, l. c. 3.

Of the three departments therefore into which law may be divided, having regard to the political or non-political character of the persons whose rights it regulates, it must be borne in mind that what is not very happily described as 'Municipal law,' in its two departments 'Private' and 'Public,' is alone properly so called, while 'International law' is law only by analogy.

From Holland's Elements of Jurisprudence, 320-322, 325.

The correlation of the parts of public law one to another is indeed far from being settled. It never attracted the attention of the Roman lawyers, and has been very variously, and somewhat loosely, treated by the jurists of modern Europe. The subject is indeed one which lends itself but reluctantly to systematic exposition, and it is with some hesitation that we propose to consider it under the heads of—I. Constitutional law; II. Administrative law; III. Criminal law; IV. Criminal procedure; V. the law of the State considered in its quasi-private personality; VI. the procedure relating to the State as so considered.

The first four of these heads contain the topics which are most properly comprised in Public law. * * *

The primary function of Constitutional law is to ascertain the political centre of gravity of any given state. It announces in what portion of the whole is to be found the 'internal sovereignty,' 'suprema potestas,' 'Staatsgewalt,' or, as Aristotle called it, τὸ κύριον τῆς πόλεως.⁴ In other words, it defines the form of government.

The sovereign part of the State, as thus ascertained, is omnipotent.⁵ Since it is the source of all law, its acts can never be il-

⁴ Polit. iii. 10. 1. Πολιτεία μὲν γὰρ ἐστὶ τάξις ταῖς πόλεσιν ἢ περὶ τὰς ἀρχάς, τίνα τρόπον πενέμνεται, καὶ τί τὸ κύριον τῆς πολιτείας καὶ τί τὸ τέλος ἐκάστης τῆς κοινωνίας ἐστίν. Ib. iv.

⁵ "The principle in the English government, that the parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government. But in this and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution. The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate

legal. As little can they be, strictly speaking, unconstitutional. The latter term is properly applied only to characterise an act of an inferior political authority in excess of its delegated powers. Thus a statute passed by the Congress of the United States may be unconstitutional, because the sovereign people has empowered the President and Congress to legislate only subject to certain reservations, and has entrusted to a Supreme Court the duty of deciding whether any given enactment is or is not made in pursuance of the restricted powers thus delegated; but the authority of the Queen, Lords, and Commons in England is fettered by no such limitation. An act is, strictly speaking, never unconstitutional unless it is also illegal, and can never be either if it is the act of the sovereign power. Only in a lax sense of the term is it permissible to describe as unconstitutional acts of the sovereign power which run counter to the expectations and political usages of the inhabitants of a country. * * *

The various organs of the sovereign power are described by constitutional law as at rest; but it is also necessary that they should be considered as in motion, and that the manner of their activity should be prescribed in detail. The branch of the law which does this is called Administrative law, 'Verwaltungsrecht,' in the widest sense of the term. In this sense Administration has been defined as 'the exercise of political powers within the limits of the constitution'⁶, as 'the total concrete and manifoldly changing activity of the State in particular cases',⁷ and as 'the functions, or the activity, of the sovereign power'⁸.

constitution of its particular state, and if it infringes the provisions of either it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, and to regard the constitution, first of the United States and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform. The constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point, with us, that every act of the legislative power contrary to the true intent and meaning of the constitution, is absolutely null and void." 1 Kent, Comm. 449, 450.—Ed.

⁶ Ahrens, Cours, ii. p. 380.

⁷ Bluntschli, u. s. iii. p. 465.

⁸ Pütter, apud Holzendorff, Encyclopädie, Erster Theil (ed. i.) p. 695.

Different views are taken as to the topics which are included under this very wide conception. It may fairly be said to include the making and promulgation of laws, the action of the government in guiding the State as a whole, the administration of justice, the management of the property and business transactions of the State, and the working in detail, by means of subordinates entrusted with a certain amount of discretion, of the complex machinery by which the State provides at once for its own existence and for the general welfare. * * *

§ 2. Written and Unwritten Law.

From Maine's Ancient Law, 13, 14.

The epoch of customary law, and of its custody by a privileged order, is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case law is sometimes spoken of as unwritten, and there are some English theorists who assure us that, if a code of English jurisprudence were prepared, we should be turning unwritten law into written,—a conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay public. Whether all the law which they claimed to monopolize was really unwritten, is exceedingly questionable; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the courts at Westminster Hall began to base their judgments on cases recorded, whether in the year books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying

with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case law, and only different from code law because it is written in a different way.

§ 3. The Law of Persons and the Law of Things.

From Markby's Elements of Law, §§ 296, 299, 300.

Private law has been again subjected to a classification which is nearly as celebrated, and which is derived from the same source. In the language of the Institutes, "jus privatum vel ad personas pertinet, vel ad res, vel ad actiones"; or, as modern authors say, private law consists of the law of persons, the law of things, and the law of procedure. This classification is just as inaccurate and just as useful as the last. In one sense it may be said of every law, public or private, "ad personas pertinet." Every law is addressed to a person, bidding him do or not do a particular thing. But the objects of law, as they are called, may be either things or persons; and it is with reference to this division between the objects of law that the classification of private law into the law of persons and the law of things has been made. There are, however, very few laws of which the objects are exclusively persons or exclusively things. The law, for example, which places the son under the control of the father, gives also to the father the fruits of the son's labor. And even the law which enforces a contract for the supply of goods affects the liberty of action of the contracting parties. Yet no one hesitates to place the first in the law of persons and the second in the law of things.

As to the subdivision of private law, it will, I think, be found that in the law of persons we chiefly find rights and duties which are attached to certain classes of the community; that is, a certain indeterminate number less than all. In the law of things we find chiefly rights and duties which affect the community at large.

When we find an aggregate of rights and duties attached to certain classes of the community, we call that aggregate, as I have explained above, a status, or condition. Hence the law of persons has sometimes been called the law of status or condition.

From 2 Austin's Jurisprudence, §§ 970-973.

From law considered with reference to its sources, and to the manner in which it begins and ends, I pass to law considered with reference to its purposes, and to the subjects about which it is conversant.

The first great distinction of law considered under this aspect, is the celebrated one into the "law of persons" and the "law of things"; or, as I think it ought to be stated, the "law of things" and the "law of persons."

This distinction may be stated generally as follows:

There are certain rights and duties, with certain capacities and incapacities to take rights and incur duties, by which persons, as subjects of law, are variously determined to certain classes. By a capacity I mean this: A person is capable of a given right and of a given duty if, on the happening of a given event, the law would invest him with that right, or impose on him that duty.

The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status with which the person is invested.

One and the same person may belong to many of the classes, or may occupy, or be invested with, many conditions or status. For example, one and the same person, at one and the same time, may be son, husband, father, guardian, advocate, or trader, member of a sovereign number, and minister of that sovereign body.

The rights, duties, capacities, and incapacities, whereof conditions or status are respectively constituted or composed, are the appropriate matter of the department of law which commonly is named the "law of persons,"—"jus quod ad personas pertinet"; "jus personarum"; "de conditione hominum." Less ambiguously, and more significantly, that department of law might be styled the "law of status." For though the term "persona," in one sense of the word is properly synonymous with "status," yet in its usual and more commodious signification it denotes, not "status," but "homo,"—a man, including woman and child; or it denotes an aggregate or collection of men.

The department, then, of law, which is styled the "law of persons," is conversant about status or conditions; or, expressing the same thing in another form, it is conversant about persons, meaning men, as bearing or invested with persons, meaning status or conditions.

The department of law which is opposed to the "law of persons" is commonly named the "law of things," "*jus quod ad res pertinet*," or the department of law "*de rebus*."

How this department of law came to be called the "law of things" is somewhat obscure; but, referring to what has been said in Lecture 12, *supra*, about the various meanings of this flexible word "*res*," it seems not impossible to catch the train of ideas. It has been seen that "*res*," or "*thing*," in its widest meaning, embraced the whole matter with which laws are conversant (see volume 1, p. 240). Having for convenience singled out a department of law and called it, not without significance, "*law of persons*," it seems natural that the authors of those institutional treatises—familiar with the term "*res*" as wide enough to embrace all the subject-matter of law—should call the opposed department the "*law of things*." This would be the more easily suggested to their minds from the circumstance that "*res*," in the narrow and strict sense of the word was already opposed, as has been shown⁹ to persons.

That such was the general conception of the distinction by the Roman jurists is manifest from the order adopted in the Institutes. The first book of the Institutes of Justinian, following Gaius, treats of the law relative to status or conditions under the name "*de jure personarum*," or "*de condicione hominum*." The second opens with words to this effect:

"Having treated of the persons, let us now treat *de rebus*." It then proceeds to divide "*res*" into "*corporales*" and "*incorporales*," and then treats of rights and duties under their various subdivisions.

It would be absurd to suppose that the law of persons can peculiarly relate to persons, meaning "*homines*," or human beings, or the law of things to things, in the proper sense of the term. Many rights and duties treated of in the law of persons relate to things properly so called; as, for instance, an estate in land belonging to a married woman. And many rights and duties treated of in the law of things have no regard to things proper; as, for instance, the right arising from an obligation to forbear under a contract.

The distinction, therefore, between the law of things and law of persons rests upon the notion of status or condition. The law of per-

sons is that part of the law which relates to status or conditions. The law of things is the law—the “corpus juris”—minus the law of status or conditions. The law of persons is the law of status or conditions, detached, for the sake of convenience, from the body of the entire legal system.

The question, therefore, which first arises is this: What constitutes a status or condition?

The rights, duties, capacities, or incapacities, which, as above mentioned, determine a given person to a given class, constitute his status or condition. His condition is not the source of his distinctive rights and obligations, for these are his condition. The source of these rights and obligations is the fact, event, or incident which invests him with the condition; that is to say, which gives him the rights and capacities, and subjects him to the duties and incapacities, of which the condition is composed. For example, a barrister or an attorney is distinguished from other men by peculiar obligations which are imposed on him and by peculiar rights which he enjoys. These obligations and these rights are the condition of barrister or of attorney. The source or cause of his condition, or of his distinctive obligations and rights, is his call to the bar, or his admission as attorney.

§ 4. Civil and Criminal Law.

From Salmond's First Principles of Jurisprudence, 67-74.

Based on the distinction between the remedy of punishment and that of redress is the distinction between the administration of criminal and that of civil justice. The former is the application to wrongs of the remedy of punishment; the latter is the application of the remedy of redress. Similarly a crime is a wrong regarded in relation to the remedy of punishment, while a civil wrong is a wrong regarded in relation to the remedy of redress. Not all wrongs are punished, neither are all redressed; while many are dealt with in both ways. Hence, a wrong may be merely civil or merely criminal, or both civil and criminal. The distinction often drawn between corrective and retributive justice is equivalent to that between civil and criminal.

It is scarcely necessary to say that with those who hold that the object of all law is punishment, this explanation of the distinction

between civil and criminal justice is inadmissible. It is necessary for such to discover some other ground of the distinction, and that which has found almost universal acceptance is that a crime is a wrong done to the state or the community at large, while a civil injury is inflicted merely upon determinate individuals. Blackstone's statement of this view may be taken as representative. "Wrongs," he says,¹⁰ "are divisible into two sorts or species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals considered as individuals, and are therefore frequently termed 'civil injuries'; the latter are a breach and violation of public rights and duties, which affect the whole community considered as a community, and are distinguished by the harsher appellations of 'crimes' and 'misdemeanors.'"

But the objections to this view seem insurmountable; for a little consideration will make it very plain that the distinction between crimes and civil wrongs cannot be based on any difference between the acts themselves, so named, or between their respective consequences. For, in the first place, the line drawn between these two species of wrongs is different in different legal systems, and varies from time to time in the same system. What is a civil wrong to-day may be made by parliament a crime to-morrow. And, in the second place, if every wrong is a crime which in actual fact is injurious to the community at large, then all wrongs must be crimes. For even those which primarily and directly affect specific individuals have a secondary, indirect, and diffused effect on the community at large, or on an indeterminate portion of it. Both robbery and breach of contract primarily affect particular individuals, but secondarily each affects society by virtue of the general insecurity of property and diminution of mutual trust which such wrongs tend, respectively, to produce. But it is universally admitted that crimes are merely a species of wrongs; therefore, the essential difference cannot be one between the acts themselves. Consequently, it must lie in the manner in which, or the point of view from which, the acts are dealt with or looked at by the law. This, indeed, is a conclusion which most adherents of the view now under consid-

eration would probably accept. Let us, therefore, amend Blackstone's statement, and say that a wrong amounts to a crime when and in so far as it is regarded by the law as done to the community at large, while a civil wrong is one regarded by the law as inflicted on some determinate individual. But even so we shall not attain to the truth. How are we to know what wrongs the law regards as inflicted on the community, and what as inflicted on individuals? What distinction, in legal practice, is founded on this alleged distinction in legal theory? In what special way does the state treat the one class of offenses as distinguished from the other? It cannot be contended that the distinction is a mere barren theory, without any results in practice. It is certainly not a product of a refined jurisprudence, but is one of practical importance in every legal system that has made any considerable advance from barbarism.

In answer to this inquiry it will, perhaps, be said that the fundamental practical distinction between criminal and civil justice is that in the former the community itself, by its bodily form, the state, is a party to the proceedings, as being the person injured by the wrong, while civil proceedings are between private persons. But this view merely requires to be stated for its fallacy to appear. Every legal proceeding in which the community is a party is not criminal; and every proceeding in which only private persons are parties is not civil. It will scarcely be contended that an action by the state against an individual for the recovery of a debt, or for damages for breach of contract, or for the restoration of property belonging to the state, or for the enforcement of a public trust, is a criminal proceeding. Yet all these are proceedings in which the state is the party plaintiff, and in which consequently the state is clearly regarded by the law as the party injured by the wrong complained of. The truth is that the distinction between crimes and civil injuries is perfectly well established, even within the sphere of wrongs done to the state or community at large. Such wrongs are sometimes crimes, sometimes civil injuries, and the division between public and private wrongs, and that between crimes and civil injuries, are, therefore, not coincident, but cross, divisions. So, on the other hand, there are criminal proceedings to which the state is no party. One instance of this is the obsolete procedure of appeals

of felony. These were private prosecutions at the suit of the injured party, yet, as they ended, if successful, in the hanging of the defendant, it can scarcely be contended that they were civil actions, or that an offense so dealt with was a mere civil injury. But it is not necessary to have recourse to ancient history for instances. Most of the very numerous offenses that are now punishable on summary conviction may be so dealt with at the suit of a private party; yet the proceedings are undoubtedly criminal.

This contention being thus disposed of, in what other way can it be suggested that the supposed theoretical distinction between public and private wrongs is manifested in practice? The only possible suggestion is that the practical difference lies in the remedy applied. And, if we get this length, it is difficult to avoid the further conclusion that, since the fundamental distinction between legal remedies is that between punishment and redress, this is the distinction on which is based the division between civil and criminal justice. And if we admit that this is the practical distinction between civil procedure and criminal procedure, we must admit, further, that it is also the theoretical distinction between a civil injury and a crime. It is idle to contend that, although in practice the distinction between a crime and a civil injury is that the former is a ground of punishment and the latter a ground of redress, yet in legal theory the distinction is that a civil injury is a wrong to an individual, and a crime a wrong to the community at large. For this is equivalent to counting that the only ground the state has, or in reason can have, for punishing a wrong, is that such wrong is one done to the community; and, similarly, that the only actual or possible reason for redressing or undoing a wrong is that it is done to a determinate individual. But no such contention can be maintained. Reason demands that, in general, the two remedies of punishment and redress shall be, not alternative, but cumulative. If possible, the law should not only undo a wrong in the present, but also take measures to prevent its repetition in the future. The first requisite is satisfied by redress; the second, by punishment.¹¹

¹¹ There are, of course, various exceptions to such duplication of remedies. For example, punishment is the sole remedy in cases where redress is impossible; and redress is the sole remedy in those cases in which it is itself a sufficient precautionary measure for the future.

It is clear that the purposes of these remedies are entirely independent of the distinction between public and private wrongs. A wrong ought to be prevented by punishment, whether it is done primarily to an individual, or merely to the society at large. A wrong ought equally to be redressed whether its incidence is determinate or indeterminate. The element of truth contained in the contention lies in the fact that in the case of wrongs that are not done to any specific individual, redress is usually less practicable and less urgently required than in those cases in which the mischievous consequences fall on a single head; while, on the other hand, in the case of wrongs which are inflicted primarily on particular individuals, if both this primary mischief and the secondary diffused mischief which accompanies it are small in amount, redress is often itself an adequate substitute for punishment. For these reasons, the line between criminal and civil, and that between public and private, wrongs, are to a considerable extent coincident. But such coincidence is far from complete. Public wrongs are often redressed. A man is not punished for not paying his taxes. He is compelled to pay them. And private wrongs are often punished as such. In the case of robbery or murder, for example, what possible warrant is there for separating the injury to the community from that done to the specific person robbed or murdered, and for asserting that the state, in inflicting punishment, looks merely at the former? What sense is there in the idle fiction that libel is redressed as being an injury to the character of the individual, but punished as tending to a breach of the public peace?

Before leaving this matter, an explanation requires to be made. We have already seen that a certain species of redress, which we have distinguished as imperfect or unilateral, is not pure redress, but a hybrid between redress and punishment. What shall we say, therefore, of a wrong to which such penal redress, as it may be called, is applied? Is it a civil or a criminal wrong? In strict theory it should be regarded as both, differing from other wrongs which partake of both characters in the single circumstance that the civil and the criminal remedy are united, instead of being separately applied. In actual law, however, such wrongs are regarded as purely civil. They take their character from the primary object of the remedy applied to them, which, as we have seen, is redress.

From Markby's Elements of Law, §§ 599, 600.

Liability is not unfrequently divided into civil and criminal liability. This classification of liability is not based upon any distinction in the nature of the two kinds of liability, but upon a difference in the tribunal in which the party liable is proceeded against. If the court where the party is proceeded against be what is called a "criminal court," or "court of criminal jurisdiction," the liability is considered to be criminal, and the breach of duty is called a "crime" or an "offense."¹² If the court in which the proceedings are taken be a civil court, or court of civil jurisdiction, the liability is considered to be civil, and the breach of duty is called a "civil injury." But there are some courts which exercise both jurisdictions, and there is then some difficulty in distinguishing criminal and civil liability. By long habit we have come to consider certain kinds of personal violence, certain breaches of the laws which protect property, and certain kinds of fraud to be crimes. But where there is no such tradition as, for example, in the case of the refusal of a father to support his bastard child, it has been found very difficult to determine whether or no the breach of duty is a crime. The French law draws the line between civil and criminal liability by means of the Code. Civil injuries are those breaches of duty which are dealt with by the Code Civil. Offenses are those breaches of duty which are dealt with by the Code Penal. Offenses are divided into "crimes" (specially so called), "délits" (using in a narrower sense the same word as is used to describe a certain class of civil injuries), and "contraventions de police"; the latter class containing a good many matters which we should bring under civil liability.

Whilst, too, we find that in modern times the division between civil injuries and crimes is fluctuating and uncertain, we observe that in the earlier stages of society, if it existed at all, it was based on entirely different notions.¹³ To exact for all injuries both to person and property a payment in money to the person injured appears to have been the first form of legal liability for injuries to private persons alike in Greece, in Rome, and among the Teutonic tribes. The first

¹² Curiously enough even in a penal code the duty is never defined; only the breach.

¹³ Maine, *Anc. Law*, c. 10; Kemble's *Saxons in England*, bk. 1, c. 10.

idea of criminal law, as distinguished from this, seems to have grown out of the punishment by the sovereign authority of offenses directly against itself. And the impulse to the more general development of criminal liability in later times seems to have been due, in this country, to an extension of this last notion. It is supposed, by rather an odd fiction, that by every offense the "king's peace" is disturbed, and his "dignity" offended. And it was formerly necessary in all cases that it should be so stated in the indictment; not only where acts of violence had been committed, but even where the offense charged was such as obtaining goods by false pretenses, or selling ale on a Sunday. Modern writers still attempt to preserve a somewhat similar notion, when they tell us that civil injuries are an infringement of rights belonging to individuals considered as individuals; whereas crimes are breaches of public rights and duties belonging to the whole community. However, the examples given above sufficiently show that this distinction is not adhered to.

§ 5. Law and Equity.

From Maine's Ancient Law, 28-30.

The next instrumentality by which the adaptation of law to social wants is carried on I call "equity"; meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The equity, whether of the Roman prætors or of the English chancellors, differs from the fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law, and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from legal fictions just as equity differs from them, and it is also distinguished from equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is, in theory, empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature, and not to that of the principles on which the legislature acted; and thus they differ from rules of equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts, even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences, because a student of Bentham would be apt to confound fictions, equity, and statute law under the single head of "legislation." They all, he would say, involve lawmaking; they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive ourselves of so convenient a term as "legislation," in the special sense. Legislation and equity are disjoined in the popular mind, and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

From Maine's Ancient Law, 68-72.

It would be wearisome to enter on a detailed comparison or contrast of English and Roman equity, but it may be worth while to mention two features which they have in common. The first may be stated as follows: Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when equity first interfered with it. A time always comes at which

the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus, after which, though the whole Roman world was undergoing a moral revolution, the equity of Rome ceased to expand. The same point of legal history was attained in England under the chancellorship of Lord Eldon, the first of our equity judges, who, instead of enlarging the jurisprudence of his court by indirect legislation, devoted himself through life to explaining and harmonizing it. If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand, and better appreciated on the other, than they appear to be among contemporary lawyers. Other misapprehensions, too, which bear some practical fruit, would perhaps be avoided. It is easily seen by English lawyers that English equity is a system founded on moral rules, but it is forgotten that these rules are the morality of past centuries, not of the present; that they have received nearly as much application as they are capable of; and that, though of course they do not differ largely from the ethical creed of our own day, they are not necessarily on a level with it. The imperfect theories of the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on equity, struck with the completeness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the chancery jurisprudence contemplated its present fixity of form when they were settling its first basis. Others, again, complain—and this is a grievance frequently observed upon in forensic arguments—that the moral rules enforced by the court of chancery fall short of the ethical standard of the present day. They would have each lord chancellor perform precisely the same office for the jurisprudence which he finds ready to his hand, which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies by which the improvement of the law is carried on. Equity has its place and its time, but I have pointed out that another instrumentality is ready to succeed it when its energies are spent.

Another remarkable characteristic of both English and Roman equity is the falsehood of the assumptions upon which the claim of the equitable to superiority over the legal rule is originally defended. Nothing is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visibly for the better to be decried; but there is the greatest disinclination to accept it as a primary phenomenon, and it is commonly explained as the recovery of a lost perfection,—the gradual return to a state from which the race has lapsed. This tendency to look backward instead of forward for the goal of moral progress produced anciently, as we have seen, on Roman jurisprudence, effects the most serious and permanent. The Roman juriconsults, in order to account for the improvement of their jurisprudence by the prætor, borrowed from Greece the doctrine of a natural state of man—a natural society—antecedent to the organization of commonwealths governed by positive laws. In England, on the other hand, a range of ideas especially congenial to Englishmen of that day explained the claim of equity to override the common law by supposing a general right to superintend the administration of justice which was assumed to be vested in the king as a natural result of his paternal authority. The same view appears in a different and a quainter form in the old doctrine that equity flowed from the king's conscience,—the improvement which had in fact taken place in the moral standard of the community being thus referred to an inherent elevation in the moral sense of the sovereign. The growth of the English constitution rendered such a theory unpalatable after a time; but, as the jurisdiction of the chancery was then firmly established, it was not worth while to devise any formal substitute for it. The theories found in modern manuals of equity are very various, but all are alike in their untenability. Most of them are modifications of the Roman doctrine of a natural law, which is indeed adopted in terms by those writers who begin a discussion of the jurisdiction of the court of chancery by laying down a distinction between natural justice and civil.

From Markby's Elements of Law, §§ 120-123.

There are, however, two countries of Europe in which the rules of conduct we have just been considering have played a different and more conspicuous part. I have already alluded to the effect of equity on Roman law, and the equity of the English chancellors is not wholly dissimilar, and its effects have not been less important. For a full and clear exposition of the method by which, upon an assumed principle of natural equality, or equity, the Roman lawyers managed to get rid of dogmas and distinctions which belonged to the strict law of Rome, but which were not found in the law common to all nations, I must refer the student to the chapter on "Equity" in Sir Henry Maine's *Ancient Law*. Our own notion of equity is so far identical with this, that the moral law comes in as an avowed remedy for the inconvenience and inapplicability of an already existing system. But the origin of English equity is in that early stage of history when the idea of law was very incomplete, and the exercise of the judicial function had not been clearly separated from the ordinary exercise of sovereign authority. The decrees of the court of chancery were, in their origin, founded on a sort of dispensing power residing in the sovereign by virtue of the prerogative. It was the king's conscience which was moved by an injustice; and, because it was one which was not remediable by the ordinary law, the chancellor received a commission to remedy it, sometimes from the king himself, but sometimes also from parliament.¹⁴ Of course, it was easy to pass from this to a general commission to redress grievances for which the strict rules of law supplied no adequate remedy, without noticing that thereby power was given to the court of chancery practically to fix the limits of its own jurisdiction, by determining in what cases the deficiencies of the common law rendered it necessary for itself to interfere.

Notwithstanding this, equity has, to a great extent, lost in England that feature which, at first sight, it would seem easiest to preserve, namely, its elasticity. (Sir Henry Maine¹⁵ considers that this is due to courts of equity having originally adopted certain moral principles, which have been carried out to all their legitimate consequences, and which fall short of the corresponding ethic-

¹⁴ 1 Spence, *Eq. Jur.* p. 408.

¹⁵ *Anc. Law* (1st Ed.) p. 69.

al notions of the present day. I venture to think that it is also due, in part at least, to the very different conception of law itself by modern lawyers, and to the great importance which is now attached to the stability of law, and to the necessity, in order to secure it, for a complete separation of legislative and judicial functions. I do not, of course, canvass the acute and truthful generalization that equity precedes legislation in the order of legal ideas, but I would base it on a far more general principle than the preliminary assumption of fixed ethical rules.

Consider the matter from the opposite point of view. Equity precedes legislation in legal history. Why? Because the idea of law as an inflexible rule, without the possibility of modification, is wholly unsuited to the early notions of the functions of courts of justice. According to a notion which extends far down into our own history, and which even now very largely exists in the popular mind, the function of judges is not so much to enforce the rigid commands of a sovereign as to redress grievances. The complete inversion of this conception is marked by the treatise of Austin. The first steps towards it were taken in the respect paid to precedent. Until it was complete, it was impossible to separate the province of law from the province of morality. Both ideas are comprehended under the term "justice." The flexibility and adaptability to special circumstances, which are the very essence of the remedial functions of courts of equity, conflict with the idea that the rules to be administered are rules of law, and with the conception of law which now prevails in jurisprudence.

The elasticity of equity now depends on the same cause which gives elasticity to the common law,—that it is law made by judges in the course of judicial decision; that it is *ex post facto* and concrete, and not, like an act of parliament, prospective and abstract.

From Salmond's The First Principles of Jurisprudence, 89-95.

It must be already obvious that law is not an essential element in the administration of justice. We cannot have the former without the latter, but we may have the latter without the former. The administration of justice consists essentially not, as is commonly said, in the enforcement of law, but in the application of remedies to wrongs. And this function may or may not be exercised in

accordance with pre-established principles. The proportion between the sphere of law and that of judicial discretion is not fixed, but variable, and the former may even be completely excluded by the latter. The development of a legal system consists in the gradual encroachment of law on judicial discretion,—the progressive transformation of questions of fact into questions of law. Consequently, if we trace such a system far enough back, we may come to a time when even the beginnings of law had not made their appearance. Our historical knowledge is insufficient for this in the case of the common law, for its commencement is of time whereof there is no memory. But it is otherwise with the competing system that has, within comparatively modern times, grown up within the court of chancery. In its origin, the jurisdiction of the chancellor was absolutely unfettered by any rules whatever. His duty was to do “that which justice and reason and good faith and good conscience requires in the case.”¹⁶ And of the requirements of justice and reason and good faith and good conscience he was in each particular case to judge at his own absolute discretion. In due time, however, there commenced that process of the encroachment of legal principle upon judicial discretion, of law upon fact, which marks the growth of all legal systems, and at length the sphere of discretion became as narrow in the court of chancery as in that of the king’s bench.¹⁷

Though law is thus not essential to the administration of justice, it is, for divers reasons, expedient. In the first place, it renders the course of justice uniform, and therefore knowable. It is important not only that the state, in administering justice, should distinguish accurately between right and wrong, and should apply fitting remedies to wrongs, but also that the subjects of the state should be able to predict the decisions to which, on such matters,

¹⁶ Spence, Eq. Jur. I. 408.

¹⁷ Sir William Markby, in his *Elements of Law* (4th Ed., p. 12 et seq.), calls attention to this fact of the possibility of the administration of justice without law. “This conception,” he says, “of a judicial decision as the mere application of rules of law to events which have occurred, may possibly be an ideal which we ought to endeavor to realize. But the history of law shows a very different conception of a judicial decision. It is worth while to reflect to how large an extent tribunals have existed, and do exist, without law.”

the state will come. A necessary condition of such prevision is uniformity of judicial action; and law is, as has already been seen, the chief cause of such uniformity. In the second place, law prevents the errors of individual judgment. Inasmuch as the wisdom of many is greater than that of one or few, insomuch is a decision in accordance with pre-established principle more likely to be right than one come to *pro re nata* by individual judgment. And finally law protects the administration of justice from the distorting influence of improper motives on the part of those invested with judicial functions. "At first," says Hooker,¹⁸ "when some certain kind of regiment was approved, it may be nothing was then further thought upon for the manner of governing, but all permitted unto their wisdom and discretion, which were to rule, till by experience they found this for all parts very inconvenient; so as the thing, which they had devised for a remedy, did indeed but increase the sore which it should have cured. They saw that to live by one man's will became the cause of all men's misery. This constrained them to come unto laws wherein all men might see their duties beforehand, and know the penalties of transgressing them."

Nevertheless, the existence of law is not an unmixed benefit. The substitution of fixed principles for free discretion is open to a somewhat serious objection. Principles of law are, as we have seen, almost always general in their nature. Now, a general principle is based upon abstraction; that is to say, on the disregard or elimination of the variable and less material elements, and the retention merely of the invariable elements in the particular cases falling within the principle. And we can never be sure that, in applying a general rule to a particular case, the eliminated elements may not be material; and if peradventure they are material, and we apply the general rule without having regard to them, we fall into error. This is the great objection to the substitution of law for judicial discretion. The more general the rule, the greater is the tendency to error, for the greater is the elimination of possibly material elements. But, on the other hand, the more guarded, qualified, and restricted the rule, the greater its complexity and the difficulty of its application. All that we can do, therefore, is to steer a mid-

¹⁸ Ecclesiastical Polity, bk. 1, c. 10, § 5.

dle course, so as to avoid as far as possible these two evils that lie on either side.

It is to a recognition of this and other disadvantages inherent in the administration of legal justice that we owe the distinction between law and equity. Sir Henry Maine¹⁹ has defined equity as "any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law, in virtue of a superior sanctity inherent in these principles." But to regard it as a body of fixed rules is to mistake its essential character. The true and original distinction between law and equity is one, not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion. It has already been pointed out that originally the chancellor in the exercise of his jurisdiction did that which was right in his own eyes, unbound by any pre-established rule, and that it was only by a gradual course of development that his discretion became limited, even as was that of his brethren who sat in the courts of common law. Just in so far as his discretion was thus excluded by rule, in so far did the system administered in his court cease to be a system of equity in the true sense, and become a system the same in essence as the common law.

That this was the original aspect in which equity was regarded appears sufficiently from the definitions given us by the old books. In one of these we read: "Lawmakers take heed to such things as may often come, and not to every particular case, for they could not though they would. Therefore in some cases it is necessary to leave the words of the law, and to follow what reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigour of the law."²⁰ And again:²¹ "The cause why there is a chancery is for that men's actions are so diverse and infinite that it is impossible to make any general law which shall aptly meet with every particular act, and not fail in some circumstances."

Before the institution of the system of equity, the law was rigid

¹⁹ Anc. Law (2d Ed.) p. 28.

²⁰ Cited from Doctor and Student in Spence, Eq. Jur. I. 413.

²¹ Per Lord Chancellor Ellesmere, quoted Id.

and absolute. The possibility of the change in this respect brought about by the establishment of equity was due to the idea that the king was the source and fountain of justice. The administration of justice was part of the royal prerogative, and the exercise of it had been delegated by the king to his servants, the judges. The judges themselves were bound by the principles established in their courts, but not so the king. Consequently, when any conflict arose between the rules of the royal courts and the dictates of natural justice, it was allowable for the king to disregard such rules, and to do that which seemed right in his own eyes. In other words, there was an appeal from the arbitrary rules of law to the sense of right and justice possessed by the king,—from the legal justice of the king's courts to the natural justice of the king. This appellate jurisdiction was, like the original judicial functions of the crown, delegated to a judicial officer, the chancellor, who, as exercising such jurisdiction, was regarded as the keeper of the conscience of the king. "It is the holy conscience of the queen," it was said, "that is in some sort committed to the chancellor."*

By degrees the chancellor suffered himself to be restrained by rule and precedent in his execution of the dictates of the royal conscience, and it came to be recognized that ²² "with such a conscience as is only naturalis et interna this court has nothing to do. The conscience by which he was to proceed was merely civilis et politica."

Strictly analogous to the administration of equity in its original form is the exercise of the royal prerogative of mercy. What the former was in civil justice, the latter was and is in criminal justice. The former implied an appeal from law to the royal conscience; the latter, an appeal from law to the royal mercy. The exercise of mercy, however, unlike that of equity, has never resulted in the growth of a body of fixed principles, but has retained its original character.

Langdell A Brief Survey of Equity Jurisdiction, 1 Harv. Law Rev. 115-118.

(¹) How is it that equity has the power to invade at will the provinces of other courts? (²) What object has equity in assuming juris-

* Per Sir C. Hatton, cited in Spence, Eq. Jur. I. 414.

²² Per Lord Nottingham, cited 1 Spence, Eq. Jur. 417.

diction over rights which it is the special province of other courts to protect? (3) What is the extent of that jurisdiction? The answer to the first of these questions will be found in the fact that the jurisdiction of equity is a prerogative jurisdiction, i. e. it is exercised in legal contemplation by the sovereign, who is the fountain from which all justice flows, and from whom, therefore, all courts derive their jurisdiction. The answer to the second question is that the object of equity in assuming jurisdiction over legal rights is to promote justice by supplying defects in the remedies which the courts of law afford. The answer to the third question is that the jurisdiction is co-extensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted. But then the question arises, how does it happen that the protection afforded by courts of law to legal rights is insufficient and inadequate, and how is it that equity is able to supply their shortcomings? The answers to these questions, so far as regards the largest and most important part of the jurisdiction exercised by equity over legal rights (namely, that exercised over common-law rights), will be found chiefly in the different methods of protecting rights employed by courts of common law and courts of equity respectively, i. e. in the different methods of compulsion or coercion employed by them.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him.²³ It issues its commands to the sheriff (its executive officer), and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort, or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff,

²³ So, if a defendant has refused to perform a contract, a court of law can only give the plaintiff damages, no matter how important to the latter actual performance may be. So a defendant may threaten to do the plaintiff an irreparable injury, or he may be actually doing it, and repeating it from day to day, yet a court of common law cannot prevent it. It can only give the plaintiff damages after the injury is committed. Langd. Eq. Pl. (2d Ed.) 32. —Ed.

under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff. By the latter the defendant's title to the property seized is transferred to the plaintiff, or the title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession, on the ground that the property belongs to the plaintiff, and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff, under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for a recovery of money, the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by law as a means of compelling him to pay the judgment, but his body is taken (as his property is) in satisfaction of the judgment.

Nor is our common law peculiar in its method of protecting rights; for the same method, substantially, is, and always has been, employed in most other systems of law with which we are acquainted. "Nemo potest præcise cogi ad factum" was a maxim of the Roman law, and it has been adhered to in those countries whose systems of law are founded upon the Roman law.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most all other legal systems, has wholly rejected. For, when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought

to do or refrain from doing; then by its order or decree it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of the litigants. They could not touch their bodies nor their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them in the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de ex communicato capiendo*), and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity, he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies, and control the possession of their property; but neither his orders and decrees, nor any acts, as such, done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as

we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

§ 6. Substantive and Adjective Law.

From 2 Austin's Jurisprudence, § 1032.

If I adopted the language of Bentham, and of certain German writers, I should style the law of primary rights and duties "substantive law," and the law of sanctioning or secondary rights and duties, "adjective or instrumental law."²⁴ In other words, I should divide the law of things, or the bulk of the legal system, into law conversant about rights and duties which are not means or instruments for rendering others available, and law conversant about rights and duties which are merely means or instruments for rendering others available. Substantive law, as thus understood, is conversant about the rights and duties which I style "primary"; adjective law, about the rights and duties which I style "secondary."

But it will appear, on a moment's reflection that the terms "substantive" and "adjective" law tend to suggest a complete misconception of the nature of the basis on which the division rests.

These terms suggest the division of rights and duties into two classes, under the following descriptions:

(1) Those which exist in and per se; which are, as it were, the ends for which law exists; or which subserve immediately the ends or purposes of law.

(2) Those which imply the existence of other rights and duties, and which are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose.

Now, although sanctioning rights and duties, or rights and duties arising out of injuries, are of this last character, many rights and

²⁴ It defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is substantive law. So far as it provides a method of aiding and protecting, it is adjective law or procedure. Holl. Jur. 78.—Ed.

duties which are primary or principal, or which do not arise out of injuries, are also of the same nature. The division, therefore, of law into law regarding primary rights and duties, and law regarding sanctioning or secondary rights and duties, cannot be referred to a difference between the purposes for which those rights and duties are respectively given by the state. And I object to the names "substantive and adjective law," as tending to suggest that such is the basis of the division. It appears to me that the true principle of division rests exclusively upon a difference between the events from which the rights and duties respectively arise. Those which I call "primary" do not arise from injuries, or from violations of other rights and duties. Those which I call "secondary" or "sanctioning" (I style them "sanctioning" because their proper purpose is to prevent delicts or offenses) arise from violations of other rights and duties, or from injuries, delicts, or offenses.

CHAPTER IV.

THE RELATION OF ENGLISH LAW TO AMERICAN LAW.

From 1 Kent's Commentaries, 472-473.

But though the great body of the common law consists of a collection of principles, to be found in the opinions of sages, or decreed from universal and immemorial usages, and receiving progressively the sanction of the courts, it is, nevertheless, true that the common law, so far as it is applicable to our situation and government, has been recognized and adopted as one entire system by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also established doctrine that English statutes, passed before the emigration of our ancestors, and applicable to our situation and in amendment of the law, constitute a part of the common law of this country.

From Hammond's Notes (1 Hammond's Blackstone, 283-285).

The date at which the common law must be assumed to have been adopted is commonly held to have been that of the first permanent settlement.¹ Other authorities hold that the common law was adopted as it stood in 1776,—the date of independence;² others, that the date must be fixed for each colony by its own circumstances. The law so adopted was only so much of the entire English system as was adapted to the situation and needs of the colonists. At the time of the Revolution (1776), the entire public law of England ceased to be applicable.³

¹ 4 Jac. I. (A. D. 1607): 1 Kent, Comm. p. 473, note a; Chisholm v. Georgia, 2 Dall. 435; Chalm. Col. Op. p. 206.

² Cooley, Const. Lim. 25; Dup. Jnr. p. 89; Sedg. St. & Const. Law, 10.

³ Cooley, Const. Lim. 23; Sedg. St. & Const. Law, pp. 6, 9; Van Ness v. Pacard, 2 Pet. 137, 144; Terrett v. Taylor, 9 Cranch, 46; Town of Pawlet v. Clark, Id. 333; Rex v. Vaughan, 4 Burrows, 2500.

The system of law so adopted was the common law, therefore, as modified by all statutes passed prior to the date of adoption. Such statutes are not written law with us, but a part of the common law. * * *

There are, however, dissenting opinions holding that the English statutes are adopted as such, and not as part of the common law. Judge Minor speaks of the common doctrine as "pernicious and unwarrantable."⁵

In New York, the constitution of 1777,⁶ declared "that such parts of the common law of England and of the statute of E. and G. B. * * * as together did form the law of said colony on the 19th of April, 1775, shall be and continue the law of this state"; and the statute of 1788 was evidently intended to interpret the clause underlined, which was omitted in the constitutions of 1821 and 1846.⁷

From Dillon's Laws and Jurisprudence of England and America, 155-157.

Now, the great fact which, as we approach this subject, meets our view, is that the common law (including in the phrase "common law," as here used, the supplemental equity system of the court of chancery, which grew out of the common law, and constitutes a part of it) underlies the whole system of American law and jurisprudence. The expression the "common law" is used in various senses: (a) Sometimes in distinction from statute law; (b) sometimes in distinction from equity law; and (c) sometimes in distinction from the Roman or civil law. I use it in this lecture in the latter sense. I do not stop to inquire how the common law came to be introduced here and adopted by us. I deal with the fact as it exists, which is

⁴ Wils. Law Lect. 48-55; Sedg. St. & Const. Law, 6; Chalm. Col. Op. pp. 208, 209; 1 Kent, Comm. p. 473, and notes; Com. v. Leach, 1 Mass. 59; Com. v. Knowlton, 2 Mass. 534; Doe v. Winn, 5 Pet. 241; Bogardus v. Trinity Church, 4 Paige, 197; State v. Rollins, 8 N. H. 550.

⁵ Inst. 1, 43; 1 Kent, Comm. 473; Levy v. McCartee, 6 Pet. 110. Cf. Johnson, J., in 5 Pet. 245. That was a New York case, and the point decided was that a statute passed in 1788, "that none of the statutes of England or Great Britain shall be considered as laws of this state," repealed a statute of 11 & 12 Wm. III. c. 6, and all other English statutes, and did not leave them in force as part of the common law.

⁶ Article 35.

⁷ See Sedg. St. & Const. Law, pp. 10, 11.

that the common law is the basis of the laws of every state and territory of the Union, with unimportant and gradually waning exceptions. And a most fortunate circumstance it is that, divided as our territory is into so many states, each supreme within the limits of its power, a common and uniform general system of jurisprudence underlies and pervades them all; and this quite aside from the excellences of that system concerning which I shall presently speak. My present point is this: that the mere fact that one and the same system of jurisprudence exists in all of the states is of itself of vast importance, since it is a most powerful agency in promoting commercial, social, and intellectual intercourse, and in cementing the national unity. This view is so important that I must take leave to dwell upon it for a moment.

Jurisprudence, as I have heretofore pointed out, is not something in the air,—something lifted up above and abstracted from the life of men,—but an eminently practical science, which has to do directly with the conduct and relations of men, and with their conduct and relations as members of a particular state. It therefore necessarily partakes of a national character,—as, for example, Roman jurisprudence, German jurisprudence, English jurisprudence, etc., referring thereby to the principles and character of the distinctive legal systems of these several peoples. The Roman law affiliates the legal systems of continental Europe, and gives them a common and organic character. So, the common law affiliates the legal systems of England and the United States, and also the legal system of each of the American states with the legal systems of all of the other states of the Union. It makes them all akin. It gives them an organic character. It is a living bond of union, since it is the cause and medium of a constant and active intercommunication and intercourse, making the people of the whole country neighbors. The legal systems of our 44 states have not only the same general character, but they are substantially uniform and identical. So completely is this the case that I speak from my observation and experience when I state that a thoroughly educated and trained lawyer of any one state, having access to the statutes and reports, is competent to deal with, and in fact our lawyers daily do deal with, questions and cases arising in and governed by the laws of any of the other states. Undoubtedly, there are frequent inconveniences and occasional mis-

chiefs growing out of diversities in local legislation, and undoubtedly these could be materially reduced, and ought to be; but, after much experience and reflection, I am of opinion that these inconveniences and mischiefs are somewhat exaggerated; for, after all, the common law gives to our legal system in all of the states not only a distinctive, but essentially a homogeneous, character.

From Black's Interpretation of Laws, 436, 437.

A decision by the superior courts of Great Britain, while it would not be conclusive upon the courts of this country, as a direct authority, will be entitled to high consideration, as an evidence of the law, where it does not turn upon a local statute or custom, but is explanatory of the common law or of the doctrines of equity.* "Great Britain and the thirteen original states had each substantially the same system of common law originally, and a decision now by one of the higher courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the states, though not necessarily to be accepted as binding authority any more than the decisions in any one of the other states upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the Revolution is in the direct line of authority."⁹ Thus, the English decisions construing the common or statutory law, made before the separation of the two countries, are entitled to much higher authority than those which may have been rendered since that event. In particular, with reference to statutes of the parent country which were adopted in the American states, or constituted a part of the original law which they assumed to live under after the War of Independence, English decisions upon their construction, made after the separation, are not to be received as absolute or imperative authority by our courts, except in so far as they show what was the course of judicial decisions prior to that event.¹⁰

* Hilliard v. Richardson, 3 Gray, 349.

⁹ Cooley, Const. Lim. 52.

¹⁰ Mayor, etc., of Baltimore v. Williams, 6 Md. 235.

CHAPTER V.

THE SOURCES OF ENGLISH AND AMERICAN LAW.

From 1 Blackstone's Commentaries, 63.

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: The *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.¹

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom, and, likewise, those particular laws that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law "*leges non scriptæ*," I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true, indeed, that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason: that the nations among which they prevailed had but little idea of writing. Thus, the British as well as the Gallic druids committed all their laws as well as learning to memory;² and it is said of the primitive Saxons here, as well as their brethren on the continent, that "*leges sola memoria et usu retinebant*."³ But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law "*leges non scriptæ*," because their original institution and authority are not set down in writing as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. * * *

¹ Nevitt v. Bank, 6 Smedes & M. (Miss.) 596.

² Caes. de b. G. lib. 6, c. 13.

³ Spelm. Gl. 362.

Our ancient lawyers, and particularly Fortescue,⁴ insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and undiluted. This may be the case as to some; but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance, and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another, though, doubtless, by the intermixture of adventitious nations,—the Romans, the Picts, the Saxons, the Danes, and the Normans,—they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon, are mixed as our language; and, as our language is so much the richer, the laws are the more complete.

And, indeed, our antiquaries and first historians do all positively assure us that our body of laws is of this compounded nature, for they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various that he found it expedient to compile his Domebook or Liber Judicialis, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. * * *

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this Code of Alfred in many provinces to fall into disuse, or, at least, to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts.⁵

Out of these three laws, Roger Hoveden⁶ and Ranulphus Cestrensis⁷ inform us, King Edward the Confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom,

⁴ Chapter 17. ⁵ Hall. Const. Hist. 55. ⁶ In Hen. II. ⁷ In Edw. Confessor.

though Hoveden and the author of an old manuscript chronicle * assure us likewise that this work was projected and begun by his grandfather, King Edgar. * * *

Both these undertakings of King Edgar and Edward the Confessor seem to have been no more than a new edition or fresh promulgation of Alfred's Code or Domebook, with such additions and improvements as the experience of a century and a half had suggested; for Alfred is generally styled by the same historians the "*Legum Anglicanarum Conditor*," as Edward the Confessor is the "*Restitutor*." These, however, are the laws which our histories so often mention under the name of the "*Laws of Edward the Confessor*."

* * * These, in short, are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of the "*common law*,"—a name either given to it in contradistinction to other laws, as the "*statute law*," the "*civil law*," the "*law merchant*," and the like, or, more probably, as a law common to all the realm, the "*jus commune*" or "*folcright*" mentioned by King Edward the Elder, after the abolition of the several provincial customs and particular laws beforementioned.

But, though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs so collected are of higher antiquity than memory or history can reach, nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom; whence it is that in our law the goodness of a custom depends upon its having been used time out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

This unwritten or common law is properly distinguishable into three kinds: (1) General customs, which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification; (2) particular customs, which for the most part affect only the inhabitants of particular districts; (3) certain particular laws, which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

As to general customs, or the "common law," properly so called: This is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offenses, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. * * *

But here a very natural and very material question arises: How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws,—the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "viginti annorum lucubrationes," which Fortescue⁹ mentions; and from being long personally accustomed to the judicial decisions of their predecessors.¹⁰ And, indeed, these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

From Hammond's Notes, 1 Hammond's Blackstone, 206-209.

These are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of the "common law"; yet the maxims and customs so collected are of higher antiquity than memory or history can reach.

Much wit and some serious argument have been spent upon this doctrine of the immemorial antiquity of the common law. * * * The actual rules and customs of the common law may change almost with every generation. We may trace with the greatest ease the dying

⁹ Chapter 8.

¹⁰ Grisham v. State, 2 Yerg. (Tenn.) 595. Cited Fraser v. Willey, 2 Fla. 119; Tison v. Mattair, 8 Fla. 125; Lockwood v. Crawford, 18 Conn. 370; Panie v. Smead, 2 D. Chip. 56.

out of a large part of the institutions and usages and legal conceptions of the Year Books, or the introduction at a much later period of most of those which fill our reports to-day. We may prove from history that the particular rules of law have their birth and continuance and decay as truly as the generations of men; and yet the system of common law as a whole may as truly be styled of immemorial antiquity as the succession of ancestors to whom the present representatives of a family owe their existence. The common law is common reason, and, like that, has an existence quite independent of its teachings to each successive generation.

There is, however, a sense in which this immemorial existence may justly be asserted of each common-law doctrine. The particular custom or maxim or rule which we now call a part of the common law cannot show the precise date of its birth, or its individual progenitors, as every member of the family can do. It has come "without observation," as a mere development or growth from what existed before it. It has not, like a statute or a decision, its fixed date of beginning, prior to which we can say that it was not. When it makes its first appearance, it is not as something new in principle, but only a new application of familiar and settled principles; and even this new application is to something of the same species or class with those previously governed by it. The common law changes only as the persons and things which are its objects change. It is easy to see that all the rules which govern the vast subject of railway communication—the relations of carriers to their passengers and the owners of their freight—must be very modern, for no such questions could have arisen sixty years ago. Yet by far the largest part of those new rules have been formed of the principles which regulated the stagecoach and the carrier's wagon, modified only to fit the novel qualities possessed by a powerful, rapid, and dangerous means of communication. Tracing any one rule back from decision to decision, we cannot find at any step a place where the court has consciously made a new law. If each of these steps has differed a little from the one by which it was reached, still each rests upon its predecessor for all the authority which can be said to be purely legal. The law does not change, but the world it governs does. The immemorial quality of the common law is not affected by any novelty in its applications; and each of its rules is entitled to be considered

immemorial also, if it is necessarily implied in the system, and if, in tracing it back, we can find no definite beginning, no point at which an act of legislation intervened. * * *

From Markby's Elements of Laws, §§ 89-91.

In England alone we find the overwhelming influence of the Roman law successfully resisted. True it is that not a few maxims of the Roman law have been transferred to English law, but no one has ever been able to quote a text of the Roman law as authority either in the courts of common law or the courts of chancery. It was only within the very narrow jurisdiction which the ecclesiastical courts managed to secure, and in the comparatively insignificant affairs of the admiralty courts (which dealing with foreigners felt the want of a universal law), that the Roman law was accepted. For a long time the ecclesiastics struggled to procure for it a more general acceptance. The crown generally leaned in its favor,¹¹ though occasionally, under the influence of the fear that its introduction might throw too much power into the hands of the church, the sovereign cast his weight into the other scale. But the English lawyers as a body never wavered. The judges, with a dogged persistence, kept the Corpus Juris as an authority out of their own courts, and restrained the ecclesiastical courts if they attempted to interfere in matters which did not belong to them. The nobility and the commons were equally opposed to the introduction of Roman law. It must at times have been a hard struggle to maintain against the learning and influence of the clergy the ruder customs of England, to which Glanvil, Fleta, and Bracton can scarcely bring themselves to allow even the name of law. And all the writers I have named attempted to introduce the principles of Roman law into English courts by incorporating them into works professing to treat of the laws and customs of England. But the attempt met with little success. It was perhaps due to this very admixture of Roman law that the authority of even so accomplished a writer as Bracton was repudiated so emphatically by the judges.

The resource of the English lawyers, when called on to fill the

¹¹ Besides the servile maxim so often quoted, "Quod principi placuit legis habet vigorem," which Bracton qualifies, there is much in the Corpus Juris which flatters and favors despotism.

gap which was elsewhere supplied by the Roman law, was custom. Of this custom the judges were themselves, in the last resort, the repository. But the judges usually observed a discreet silence as to the source from which they derived the rules upon which their decisions were based. Here and there a judge or a counsel *arguendo* would mention a precedent, but, if we may trust the reports contained in the Year Books, even this was rare. Still, there appears to have been very little tendency to innovation; and there was doubtless a tradition of the courts to which every judge knew that he must conform at the peril of his reputation. Some record of the proceedings of the superior courts of justice was always kept, and we have a series of such records commencing as early as 6 Rich. I (1194). These early records might, and probably did, afford some guide in future cases, though they were not drawn up with that object. Moreover, at least as early as the reign of Edward I. the practice was begun of drawing up, in addition to these records, reports of cases heard and determined, the main, and apparently the sole, object of which was to furnish judges with precedents to guide them in their future decisions. In these Year Books there is very little argument, but only an ascertainment by oral discussion of the points at issue with the decision of the court. The reporter, however, frequently criticises the decision, and sometimes indicates in a note the general proposition of law which he supposes the decision to support. Reference is also sometimes made by the reporter to other cases involving the same point. The later Year Books give the arguments somewhat more fully, but still we do not find previous cases frequently cited. From this we might be disposed to infer that the practice of citing cases in support of an argument or a judgment was still very rare even in the reign of Henry the Eighth, when the last Year Book was published. Yet this can hardly be so, for the reports of Plowden, in the reign of Edward VI., which are much fuller than the latest Year Books, show that cases were at that time freely cited, and it is not likely that the practice came suddenly into existence. Moreover, we can scarcely account for the existence of the Year Books at all unless we suppose that the lawyers studied them and made some use of them. The importance attached to the Year Books is further shown by the numerous reprints of them which were issued as soon as the

art of printing was discovered, and also by the popularity of the abridgments made of them by Fitzherbert and Brooke. Probably, therefore, the influence of precedent upon the decisions of the judges is not to be measured by the number of cases quoted in the Year Books.

It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were used during all this period and long afterwards. In the patent of James I.¹² for the appointment of official reporters, it is, indeed, recited that the common law of England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time, and that the doubts and questions likewise which arise upon the exposition of statute laws are by the same means cleared and ruled. Nevertheless, we find Blackstone still saying that the first ground and chief corner stone of the laws of England is general and immemorial custom. But long before Blackstone's time, and in some measure perhaps owing to the patent of James I., a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding, but not compelling, those who consulted them to a conclusion. But, when Blackstone wrote, each single decision standing by itself had already become an authority, which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it, they became much more careful of their expressions, and gave much more elaborate explanations of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable,—“cases of first impression,” as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent.

¹² Pat. 15 Jac. I., in volume 7, pt. 3, p. 19, of Rymer's *Foedera* (Ed. 1741):
1 Bl. Comm. p. 72.

From Carter's "The Ideal and the Actual in the Law," 9-11.

It seems to me that this attempted explanation of the genesis of law by the hypothesis of a command is wholly illegitimate. There is no occasion for any hypothesis. The whole process is open to observation as matter of fact, and the solution of the question lies, like that of any similar problem, in a scrutiny of the actual facts. We know that we have judges, and that all we know of the law comes from their declarations. The statute book, indeed, is open to us; but we do not know the meaning of this, in any controverted case, except from the declaration of the judges. All the knowledge, therefore, which we really have of the law, comes from the judge. But how does he get at the law? Does he make it? If he did, it would be his command, and he would be the sovereign, which would be itself fatal to the theory. Any such imputation of sovereignty to the judge would be contrary to the observed and manifest fact. No such function was ever yet assumed by a judge, either openly or tacitly. The exercise of any such power would be ground for his impeachment. We all know the method by which he ascertains the law. There is no secret about it, and no occasion for resorting to hypothesis. It is in operation every day before our eyes. We have only to take note of it. Let us examine the process.

The statute book is first examined, and, if that speaks to the point and clearly, all doubt vanishes. But in the great majority of cases the statute book is silent, and what is the next resort? Inquiry is made by the judge concerning what his predecessors have done, and if he finds that a similar state of facts has been considered by them, and the law pronounced in reference to it, he declares the same rule. But in many, indeed most, of the controversies brought before him, no record is found of a precisely similar case, and the law is to be declared for the first time. Here is the interesting and crucial test of the question how the law springs into existence. That the judge cannot make the law is accepted from the start. That there is already existing a rule by which the case must be determined is not doubted. Unquestionably, the functions of making and declaring the law are here brought into close proximity; but, nevertheless, the distinction is not for a moment lost sight of. It is agreed that the true rule must be somehow found. Judge and advocates—all together—engage in the search. Cases more or less nearly approach-

ing the one in controversy are adduced. Analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and, finally, a rule is deduced which is declared to be the one which the existing law requires to be applied to the case. In all this, the things which are plain and palpable are (1) that the whole process consists in a search to find a rule; (2) that the rule thus sought for is the just rule,—that is to say, the rule most in accordance with the sense of justice of those engaged in the search; (3) that it is tacitly assumed that the sense of justice is the same in all those who are thus engaged,—that is to say, that they have a common standard of justice, from which they can argue with, and endeavor to persuade, each other; (4) that the field of search is the habits, customs, business, and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business, and manners. The conclusion is already suggested that our unwritten law (which is the main body of our law) is not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived.

I have been dealing with the process of making or finding the law as it is actually going on day by day in an old and civilized society; but the truth I am seeking to establish is perhaps better illustrated by a resort to the instances of early communities in which society is just beginning to develop itself, and where the same process is exhibited in a simple form. In early Rome, and in every other instance of which we have authentic information, we find that the first step in the administration of justice has been to elect a judge. The creation of judges everywhere antedates the existence of formal law. But, though formal law does not at first exist, the law itself exists, or there would be no occasion to appoint a judge to administer it. The social standard of justice exists in the habits, customs, and thoughts of the people, and all that is needed in order to apply it to the simple affairs of such a period is the selection of a person for a judge who best comprehends those habits, customs, and thoughts.

I shall not degrade the subject, if I call up a meaner illustration. In all athletic games—baseball, cricket, or prize fighting—a referee is appointed to see fair play. There are no commands proceeding

from a sovereign or superiors to subjects or inferiors; but there is a standard of justice founded upon the habits and usages of the game, and there is consequently a law which it is the function of the referee to declare. We have here in miniature the whole scheme of human justice.

From Markby's Elements of Law, 98-100.

A very much more important question has been raised, as to the correct appreciation of the process of making law by judicial decision. Austin has minutely criticised this process, but the published lecture which contains these criticisms is, as is so frequently the case with the scanty remains we have of the writings of that eminent jurist, made up of two disjointed fragments; and it is of course, therefore, not summed up into any final conclusions. It appears to me that the essential difference between the generation of law by judicial decision and by express legislation lies in two of the characteristics of judiciary law noted by Austin, namely, that it is *ex post facto*, and that it is always implicated with the peculiarities of the particular case in which it is applied. All the objections which can be raised against judiciary law may be traced to one or both of these characteristics,—its bulk, the difficulty of ascertaining it, its inconsistency, and so forth. To the combination of these two characteristics may be also traced its great, though possibly its only, advantage,—that of flexibility, or capacity of being adapted to any new combination of circumstances that may arise. Were the judges in England compelled, as in Italy, France, and Spain, and as has been attempted in India, to state separately and fully what French lawyers call the “motives,” and Spanish lawyers the “points,” of their decisions,—that is to say, their findings in fact and the rules of law which guide them,—there would be a complete revolution in the history of English case law. The law, being stated in distinct propositions, altogether separate from the facts, would be easily ascertained. This, coupled with our notions as to the authority of prior decisions, would render a conflict so conspicuous as to be almost impossible. The law would soon become clear and precise enough; but, so far as judicial decision was concerned, it would become much more rigid. It is because English judges are absolved from the necessity of stating general propositions of law, and because, even when these

are stated, they are always read as being qualified by the circumstances under which they are applied, that our law remains bulky and uncertain, but has also, in spite of our respect for precedent, remained for so long a period flexible. Whether it would be found possible to combine our practice as to the generally unquestionable authority of prior decisions with the practice of laying down abstract propositions of law, separate from and independent of the particular facts, is an experiment which, as far as I am aware, has not yet been tried.

The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all the qualifying circumstances is a very peculiar and difficult one. The opinion of the judge, apart from the decision, though not exactly disregarded, is considered as extrajudicial, and its authority may be got rid of by any suggestion which can separate it from the actual result. Unless, therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may have been stated, it passes from the province of *auctoritas* into that of mere *literatura*. Curiously enough, it is not the opinion of the judge, but the result to the suitor, which makes the law.¹³

Paley has called the process by which law is extracted from a series of decisions the competition of opposite analogies.¹⁴ Austin considers that this process is not necessarily confined to the extraction of law from judicial decisions, and that it may as well be employed in the application of ascertained rules of law to particular cases. But, as I have said, it is the peculiarity of English judges that they do not think themselves bound to distinguish these two operations, and that they very frequently perform them simultaneously. They, in fact, determine the law only by applying it. And I think Paley's description of forensic disputation and judicial decision is both forcible and accurate. "It is," he says, "by the urging of the

¹³ This is consistent with the idea that the basis of the law which comes to us through judges is custom, and not opinion.

¹⁴ 2 Moral Philosophy, p. 259. Austin seems to have thought at first that Paley was speaking only of the application, and not the extraction, of law (lecture 37, p. 653); but he afterwards changed that opinion (Fragments, p. 1031). Very likely, Paley did not, any more than judges, distinguish the two processes.

different analogies, that the contention of the bar is carried on; and it is in the comparison, adjustment, and reconciliation of them with one another, in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger, that the sagacity and wisdom of the court are exercised."

CHAPTER VI.

JUDICIAL DECISIONS AS PRECEDENTS.

- § 1. Decisions, Opinions, and Dicta.
 2. Judicial Decisions as Precedents—Between Federal and State Courts.
 3. Between Courts of Different States.

§ 1. Decisions, Opinions, and Dicta.

From 1 Blackstone's Commentaries, 69-72.

It is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.¹ Yet this rule admits of

¹ "No passage of Blackstone has been the object of more criticism, and even ridicule, than this, with its corollary that, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law. Mr. Austin speaks of the 'childish fiction' employed by our judges, that 'judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges.' * * * The assumption that the judges make new law by authority delegated from the sovereign, whenever they decide a case, runs all through this work. Mr. Digby scornfully says that Blackstone's statement that 'judicial decisions are not the source of law, but evidence of a pre-existing law, * * * would at the present day have few theoretical supporters, though its practical influence is still considerable.' Dig. Hist. Real Prop. p. 53. At least one eminent teacher of law in America takes the same view. Pom. Mun. Law (preface to 2d Ed.) p. 7, §§ 284, 295, 298, et seq. After these names it would be useless to quote the swarms of minor writers who have held Blackstone up to ridicule in small books and

exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation; for, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law,—that is, that it is not the established custom of the realm, as has been erroneously determined. And

legal periodicals. Such writers may not think themselves answered by the unbroken testimony of the judges themselves, who from the earliest Year Books to the latest reports of the highest courts have unanimously agreed that they neither made nor could make new law in deciding cases which come before them for adjudication. * * *

"The position of Austin and his followers rests upon a confusion between the historical and the scientific aspect of that doctrine. Historically considered, it is true that our judges make law. Looking over the long series of their decisions, we can see that almost every one of great name has made the law different from what it was before; has enlarged or narrowed a rule, introduced a new distinction, recognized a principle not before obvious, or in some way left the mark of his own reasoning upon the cases submitted to him. In many instances such individual work has been accepted for a time as law, and subsequently rejected as due to mistake or the idiosyncrasy of a peculiar mind. In Blackstone's words, 'it has been held by subsequent judges to be no law.' But, even where the effect of each new decision has been permanent, the fact of growth and development of the law by distinct stages is no less clear. Some judges in each generation have made changes not only accepted and acted upon by their times, but which have become a part of the permanent law of posterity. In the historical aspect of the system they have actually made new law. Indeed, if this were not so, there could be no historical study of the law in any true sense of the term. Its progress and life consist in the new law thus uttered by the judges of every generation. So it is in every science. We can trace historically the growth of creeds, the development of theological, philosophical, or scientific truths in the utterances of successive thinkers and students. No one infers from this that these men have made theological or scientific truth. No one believes that the observation and experiments by which our knowledge of physical science is constantly increasing are so many additions to nature and its laws. Every judge is as careful that his decisions should be based upon law actually existing when he makes them as the scientific observer is that his observations should represent the facts of nature. Nothing is more common in our reports than to find the courts stop at the limit of judicial power, no matter how persuasive the equities of the case may be, and regret their

hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned, but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.* And it hath been an an-

inability to lay down a new law or to change an old one, because that can be the work only of the legislature. They do this in cases where there can be no doubt of their earnest desire for the purpose of justice to carry their jurisdiction to its utmost limit; and it is a gross misrepresentation to speak of such action as a 'childish fiction,' or an attempt to conceal the process of actual legislation. All this is by no means inconsistent with the acknowledged fact of the constant growth and development of the law in time. No one, indeed, has expressed this fact more clearly than Blackstone himself, in his frequent statement of historic changes of the common law, and in the pages where he has referred to it as 'ripening,' and by other metaphors which imply the same process.

"The precedents by which each judge feels himself bound in deciding on the common law do not constitute that law, but are merely evidence of it. To use a distinction already referred to, they are the sources from which we know it, but not the sources from which it derives its own existence. This, also, is universally agreed to by the courts themselves. It has been expressly determined by the highest authorities. Thus, when the question was whether the decisions of the highest state courts were laws, and therefore by the thirty-fourth section of the judiciary act made rules of decision in the trials at common law in the federal courts, the supreme court of the United States decided that they were not, saying by Story, J.: 'In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidences of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill founded, or otherwise incorrect.' *Swift v. Tyson*, 16 Pet. 1. The same language has very recently been quoted with approval by Harlan, J., in *Railroad Co. v. National Bank*, 102 U. S. 14, 29, and by Clifford, J., in the same case. *Id.* 54."

1 Hammond's Blackstone, 213-217.—Ed.

*Herein agreeing with the civil law (Ff. 1, 3, 20, 21): "*Non omnium, quæ a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.*"

cient observation in the laws of England that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniencies that have followed the innovation.

The doctrine of the law, then, is this: That precedents and rules must be followed, unless flatly absurd or unjust; for, though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king or other superior lord. Now, this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions, and therefore can never be departed from by any modern judge without a breach of his oath and the law; for herein there is nothing repugnant to natural justice, though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, on account of a supposed hardship upon the half-brother, a modern judge might wish it had been otherwise settled; yet it is not in his power to alter it. But, if any court were now to determine that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law. So that the law and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule "that the decisions of courts of justice are the evidence of what is common law," in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.²

The decisions, therefore, of courts, are held in the highest regard,

² "Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententiam dixerit, omnes omnino iudices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus." C. 1, 14, 12.

and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings (which are preserved at large in the record), the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second, inclusive, and, from his time to that of Henry the Eighth, were taken by the prothonotaries or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the "Year Books." * * *

Besides these reporters, there are also other authors to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date, whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles.

From 1 Kent's Commentaries, 475-476.

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject; and the judges are bound to follow that decision as long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case.³ If a decision has

³ Beyond the court pronouncing the decision, and beyond courts subordinate to it, the decision does not have imperative authority as a precedent; yet, in so far as the decision establishes a doctrine, as heretofore explained, the decision is recognized in all courts as of persuasive authority. Thus, decisions of the courts of any state are cited in other states, and decisions of lower courts are cited in courts of last resort. Further, English cases are cited in American courts, and American cases in English courts. Wambaugh, *Study of Cases* (2d Ed.) 88.—Ed.

been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedent were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and, if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.

From Black's Interpretation of Laws, 384-389.

A case is to be cited as an authority for the particular proposition of law which was held to govern the rights of the parties and to determine the judgment which should be given. This proposition or doctrine of law is called the "ratio decidendi" of the particular case; that is, the legal reason which caused the case to be decided as it was decided. It may or may not be explicitly set forth in the opinion of the court.⁴ Sometimes it is assumed, and the reasoning of the court is directed to the application of the rule to the special state of facts before it.⁵ Sometimes the rule is categorically or broadly

⁴ "The reader should remember that it is the decision, that is, the judgment rendered in the case, and not the opinion of the court, which settles the point of law involved and makes the precedent. The decision is the conclusion of the court on the premises; the opinion sets forth the reasons of the determination, and usually states and explains them at greater or less length. The opinion, disclosing the reasons of the judge for his decision, is of course of great importance in the information it imparts as to the principles of law which influenced the court and were supposed to govern the case, and which should guide litigants." Black, *Interp. Laws*, 384.—Ed.

⁵ "If the case could not have been decided as it was without the recognition and application of a given rule or principle of law, the decision is an authority for that rule or principle, although it may not have been expressly

stated. But it is not the very words of the court, but the underlying principle of law, which fixes the position of the decision as an authority. Even if the opinion of the court should be concerned with unnecessary considerations, or should state the proposition of law imperfectly or incorrectly, yet there is a proposition necessarily involved in the decision and without which the judgment in the case could not have been given; and it is this proposition which is established by the decision (so far as it goes) and for which alone the case may be cited as an authority. The fact that a particular case was decided in a particular way is an argument to induce the courts to decide a similar case in a similar way, even though the judges, in the first case, imperfectly apprehended, or incorrectly stated, the legal reason which led them to their decision. * * *

Questions in a case which were not raised by the parties, not presented to the attention of the court, and not considered by the judges, are not concluded by the decision in the case, and the judgment is not an authority upon such questions, even though they are logically present in the case and might have been argued as affecting its decision, and even though such questions, if raised and deliberated upon, would have caused a different judgment to be given.

In order that the decision in one case should be available as a precedent for the decision of another case, it is not necessary that the circumstances of the two cases should be identical. Each case actually in the courts involves numerous facts or circumstances which may never be present in any other. But many of them may be immaterial to the rule of law announced in the case. If the point of difference between the two cases is such that its presence or absence could make no difference in the determination of the rule of law by which the case is to be governed, it is immaterial, and will not affect the authority of the former case as a precedent in the latter. But if there be a fact or circumstance in the former case which is not present in the latter case, and which is of such a nature that the former case could not have been ruled as it was had that fact or circumstance been absent, then the former case is not an authority for the decision of the latter. The ascertainment of such material points of difference, and the indication of their in-

stated or mentioned by the court, but only tacitly assumed." Black, *Interp. Laws*, 385.—Ed.

fluence upon the decision to be rendered, is known as "distinguishing" cases. * * *

But it also frequently happens that a case may be decided strictly on precedent, although no earlier case can be found which is on all fours with it or even a direct precedent for it. For several cases, all dealing with the same general topic, though with dissimilar aspects of it, may, by their combination, establish a general rule which is broader than the doctrine of any one of the cases taken by itself, and broad enough to include the novel case to which it is to be applied. Let it be supposed, for example, that it has been decided that an inscription painted on glass is admissible as documentary evidence in a proper case, notwithstanding the nature of the substance and the method of putting the writing upon it. Suppose further that a second case has made a similar decision with regard to an inscription cut into wood, and that a third case has laid down the same rule with reference to an inscription carved on stone. A case now arises in which the question is as to the admissibility of an inscription engraved on a gem or a ring. No one of the three previous cases is identical with it. Yet those cases, taken together, may be considered as having settled the general rule that neither the substance on which a document is inscribed nor the manner of the inscription is material, so long as it is legible and sufficiently enduring in character. And this general rule is broad enough to include the case on trial and to furnish a principle for its decision.

From Austin's Jurisprudence, § 900.

A law or rule of law, made by judicial decisions, exists nowhere in a general or abstract form.⁶ It is implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals; and, in order that its import may be correctly ascertained, the circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons

⁶ It is the duty of appellate courts, as well as of those of first instance, to pass judgment only upon the cases actually before them. They have no jurisdiction to pronounce judgments on most questions or hypothetical cases. Black, *Interp. Laws*, 387.

given for each decision must be construed and interpreted according to the facts of the case by which those reasons were elicited; rejecting as of no authority any general propositions which may have been stated by the judge, but were not called for by the facts of the case, or necessary to the decision.⁷ The reasons, when so ascertained, must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct.

§ 2. Judicial Decisions as Precedents—Between Federal and State Courts.

Thayer "*The Case of Gelpcke v. Dubuque*," 4 *Harvard Law Review*, 313-319.

There is a well-known difference in the way in which cases may be brought into the United States courts: (a) They may come there because the case involves a question under the constitution, treaties, or laws of the United States. In such cases the United States supreme court is the ultimate tribunal of appeal, whether the case has come up from a state court or from an inferior court of the United States. It has no duty of following the laws of the states, for it is now administering the law of its own government. If, in such a case, there be a question of impairing the obligation of a contract, and the state court has held that there is no contract to

⁷ A dictum is an expression of opinion in regard to some point or rule of law made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court. It may be either put forth as the personal opinion of the judge who delivers the judgment of the court, or introduced by way of illustration, argument, or analogy, but not bearing directly upon the question at issue; or it may be a statement of legal principle over and above what is necessary to the decision of the controverted questions in the case. Dicta may be entitled to respect, on account of the learning or general accuracy of the judge who pronounces them; but, as they are not the judicial determinations of the court, they are never entitled to the force and effect of precedents. Black, *Interp. Laws*, 394.

be impaired, the supreme court may re-examine that question with entire freedom, although it involve the construction of the constitution or statutes of the state. It is not in any way bound to follow the decision of the state court. Such an unfettered power is necessary in order to the full exercise of the jurisdiction of the supreme court. In the case of *Ohio Life Ins. & Trust Co. v. Debolt*,⁸ on error to the supreme court of Ohio, Chief Justice Taney, speaking, probably, for a majority of the court, remarked: "The duty imposed upon this court to enforce contracts * * * would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here." (b) But there is another ground for coming into the courts of the United States. A case may come there, * * * not because of any question arising under the constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different states or countries. In such a case the court is administering the law of the state. In this sort of case the general rule is that, since the court is applying the law of the state, it will follow, in determining what that law is and in construing it, the decisions of its highest court. If the question has not ever come up in the state court, or if there be no settled rule there, the United States court must, of course, decide for itself. But, even after such an independent decision has been made, if the highest court of the state should arrive at a different conclusion, the United States court will, in general, change from its own previous decision, and will adopt that of the state courts.⁹ Nothing could more plainly mark the secondary character of the jurisdiction of the United States courts in this region of it.

But there are various qualifications of these doctrines. The most conspicuous of them is the principle of *Swift v. Tyson*,¹⁰ in which the novel and much-contested doctrine was laid down that,

⁸ 16 How. 432.

⁹ *Green v. Neal's Lessee*, 6 Pet. 291; *Carroll Co. Sup'rs v. U. S.*, 18 Wall. 71.

¹⁰ 16 Pet. 1 (1842).

upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the state courts. This declaration was not required for the decision of that case, but it has been followed, and is an established rule of the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day. The same principle is laid down as regards the construction of ordinary language.¹¹ But in that case there was a strong dissenting opinion of McKinley, J., concurred in by Taney, C. J. Again, where the United States court has already decided a question, and a later decision of the state differs from this, the United States court may at least wait a while before changing its own decision.¹² And, finally, it was long ago intimated that a United States court would not follow the state decisions where these were regarded as biased, and unjust to citizens of other states. It will easily appear that in some sense and to some extent there should be a recognition of such a principle as the one just named. All state courts must keep within the line of reason in order to make it just that the United States courts should follow them. Yet, notwithstanding all these qualifications, it is still true, and is recognized as the sound general principle in the class of cases now under discussion, that the courts of the United States will follow the decisions of the state courts in ascertaining and construing their own law. Declarations to this effect are many and emphatic.¹³

It is with one of the qualifications of this rule that we are concerned in this case, namely, the one arising out of the danger to citizens of other states from local prejudice. I have said that some power of varying from the decisions of the states must necessarily exist as regards this sort of case; that, at least, the local courts must keep within the limits of reason. Shall the range of the United States courts, in differing from the local tribunals, go further than that, and how much further? * * * Shall they be limited merely to the prevention of results which would be absurd and ir-

¹¹ Lane v. Vick, 3 How. 464, 476.

¹² Shelby v. Guy, 11 Wheat. 361.

¹³ Elmendorf v. Taylor, 10 Wheat. 152, 159, 160; Webster v. Cooper, 14 How. 428, 502-505; Nesmith v. Sheldon, 7 How. 812; Williamson v. Berry, 8 How. 495, 558; Leffingwell v. Warren, 2 Black, 599.

rational, or may they properly go further? As I have already said, in this class of cases, as in all others, whenever a question develops which involves the law of the United States, the United States court must, as touching that, act independently, although its ground of jurisdiction over the case was originally merely the citizenship of the parties. But suppose no question of that kind to arise. * * * The lower United States courts, as we have seen, deal with such cases, because they have concurrent jurisdiction with the state courts on the ground of the citizenship of the parties; and having regard to the reason that they are given this concurrent jurisdiction, namely, the danger of injury to citizens of other states or countries, by reason of the bias of the state courts, it may be laid down that wherever state courts are likely to be under a local bias, adverse to the citizens of other states or countries, the United States courts must hold themselves at liberty to depart from the decisions of the local courts in construing and applying the local law and the local constitution, to look into the question for themselves, and to adopt their own rules of administration. This appears to be only a just assertion of the power intended to be given to these courts by the constitution of the United States, in dealing with the class of cases now under consideration. To this effect is the reasoning of Mr. Justice Bradley, speaking for the court, in *Burgess v. Seligman*.¹⁴

Assuming this to be so, we have thus far only determined that the United States courts will look into such questions for themselves. The statement of Chief Justice Taney in the case of *Rowan v. Rannels** did not go beyond this. But in the case of *Gelpeke v. City of Dubuque*¹⁵ the supreme court flatly refused to look into the merits of the question at all; and, in declining to follow the later decision of the Iowa court, a rule was laid down which established the validity of the bonds, irrespective of any opinion whether, as an original question, they were lawfully and constitutionally issued or not. The supreme court, quoting substantially an obiter remark of Taney, C. J., in *Ohio Life Ins. & Trust Co. v. Debolt*,¹⁶ put forward this proposition: "The sound and true rule is that if the contract when made was valid by the laws of the state

¹⁴ 107 U. S. 20, 2 Sup. Ct. 10.

* 5 How. 139.

¹⁵ 1 Wall. 175.

¹⁶ 16 How., cit. p. 432.

as then expounded by all departments of the government, and administered in its courts of justice, its validity cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law."¹⁷ Has the United States court any right to say this? To announce that it will not look into the question whether the bonds are originally authorized by the state constitution or not? Any right to say that although, in this court's judgment, it may be true, as an original question, that they were issued in violation of the state constitution, the court will still hold them to be valid? With a certain qualification, I think that it has. The laying down of some rule of administration is legitimate, for the court, as we see, has the right to look into the question for itself; and all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation. If this rule in *Gelpcke v. City of Dubuque*¹⁸ be understood, as it was probably meant, as being subject to a certain qualification, it appears to me good. It will not do, of course, to allow the United States courts, through the medium of any principle of presumption or judicial administration or anything else, to sanction a violation of the state constitution or the state laws. There might be a case wherein the violation of the constitution was gross and palpable, and such that those who took part in it, whether in making contracts or doing anything else, must be held to have known what they were doing; and in such a case no court would be justified in laying down a rule that would protect these parties. But courts often have to recognize, especially in the region of constitutional law, that there is more than one reasonable and allowable interpretation of a thing. It is familiar that they will not set aside the interpretation put upon the constitution by a co-ordinate legislature, in enacting a law, unless the mistake be very plain indeed,—so plain (in the ordinary phrase used in such case) as to be beyond reasonable doubt. If the rule be understood in this sense only, that any contract which was held good at the time of making it by the

¹⁷ *Gelpcke v. City of Dubuque*, 1 Wall. 206.

¹⁸ 1 Wall. 206.

highest court of the state, and which came within a permissible interpretation of the state constitution and law, will be sustained in the United States courts, I think that it is a sound one, and should be upheld. It is a rule which the state court should accept; and, if the adoption of it by the United States court led to resistance on the part of the state authorities, that is a result which must be submitted to and dealt with as may be possible. Such temporary consequences were probably anticipated when the constitution was formed; but it may be confidently expected that so just a rule will ultimately commend itself to all courts. It will be observed that the rule is one regulating the administration of a particular jurisdiction of the United States courts. It does not necessarily follow that this same rule should be applied in any other class of cases.

From Black's Interpretation of Laws, 378-381.

The settled construction put upon a public statute of a state by the courts of that state will be accepted as authentic by the courts of the United States, and will be adopted and applied by them, without inquiry as to its soundness, unless some question of federal law is involved, such as the conformity of the statute to the constitution or laws of the United States.

This rule was announced by the supreme court of the United States at an early day, and has ever since been consistently followed and adhered to.¹⁹ * * *

If there is no decision by the courts of the state on the interpretation of a statute of the state, and nothing on which to found a practical construction, or if the decisions of the state courts are conflicting and the interpretation unsettled, then the federal courts will decide for themselves as to the true construction of the statute.²⁰ And if the highest judicial tribunal of a state adopts new views as to the proper construction of a statute of the state, and reverses its former decisions, the federal courts will follow the latest settled adjudications.²¹ But the rule that the courts of the United

¹⁹ The author's citation of cases has been omitted.

²⁰ *Gardner v. Collins*, 2 Pet. 58; *Sohn v. Waterson*, 17 Wall. 596; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Myrick v. Heard*, 31 Fed. 241; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457.

²¹ *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Green v. Neal*, 6 Pet. 291; *Suydam v. Williamson*, 24 How. 427.

States must accept as binding the interpretation of a state statute by the courts of that state is subject to this exception, that in cases where the federal courts are called upon to interpret the contracts of states, they will not follow the construction adopted by the supreme court of the state in such a matter when they entertain a different opinion; and this, whether the contract alleged be claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state by its authority. * * * Where two or more states have adopted statutes in the same or substantially the same terms, but their courts differ in regard to the interpretation of the statute, the federal courts will administer the laws of each state, as therein construed, without regard to the apparent inconsistency which will result in their own decisions. In this event, such local statutes are treated as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.²² As a deduction from the general rule that the decisions of the supreme court of a state, interpreting a statute of such state, are binding on the federal courts, it has been held that where the supreme court of the United States, upon a mistaken view of the purport and effect of a decision of the supreme court of the state in such a case, renders a decision in conflict therewith, that decision is not binding on the state courts.²³

From Black's Interpretation of Laws, 427-428.

The extent to which the federal courts will feel themselves bound to follow the precedents established by the decisions of the state courts has already been pointed out, with special reference to questions concerning the interpretation of state constitutions and statutes.²⁴ It may now be further stated that substantially the same rules apply in the case of decisions which have settled a rule of property (more particularly concerning the law of real estate) and in regard to those which have been occupied with the solution of questions arising out of peculiarities of local law or usage, where

²² *Shelby v. Guy*, 11 Wheat. 361; *Christy v. Pridgeon*, 4 Wall. 196; *Louisiana v. Pillsbury*, 105 U. S. 278, 294; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466.

²³ *Goodnow v. Wells*, 67 Iowa, 654, 25 N. W. 864. ²⁴ See ante, pp. 378-380.

no question arises under the federal constitution or laws.²⁵ The cases in which the federal courts consider themselves as entirely independent of the judicial decisions of the states may be summarized as follows: (First) where such decisions are inconsistent with the decisions of the supreme court of the United States on questions of constitutional law, or involve a construction of the federal constitution, or a treaty or act of congress, or the determination of a federal question. (Second) where the question is one of general commercial law, not depending on state statutes or usages. (Third) where the question is one depending on general public policy. (Fourth) where the question is one of general equity jurisprudence.²⁶

In the courts of the states, where the question arises under the constitution or laws of the United States, or treaties made by the authority of the national government, any decision of the United States supreme court on the point at issue is to be regarded by the state courts as not only a precedent entitled to consideration, but as absolutely binding and authoritative. And even though the supreme court of a state should entertain a radically different view, yet it will decide in accordance with the rulings of the supreme federal court, because, if its decision should be adverse to any right or claim made under the constitution or laws of the Union, that decision could be reviewed on error by the supreme court of the United States, and its judgment reversed.²⁷ As to similar decisions by the inferior courts of the federal system, the state courts are not bound by them, if the question has not been adjudicated by the supreme court, but they will receive a respectful consideration and be admitted to exercise a persuasive influence on the determination of the state court. The decisions of the supreme federal court, other than such as concern the construction of the constitution or laws of the Union, are not binding as authority on the courts of a state, although they are entitled to great respect.²⁸

²⁵ Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10.

²⁶ The author's citation of cases has been omitted.

²⁷ Black v. Lusk, 69 Ill. 70.

²⁸ Lebanon Bank v. Mangan, 28 Pa. St. 452; Merchants' & Miners' Transp. Co. v. Borland (N. J. Ch.) 31 Atl. 272.

§ 3. Same—Between Courts of Different States.

From Black's Interpretation of Laws, 434-436.

We have already seen, in another connection, that the construction put upon a state statute by the courts of that state will be accepted as correct, and followed as conclusive, by the courts of another state, when called upon to interpret and apply the statute to causes pending before them.²⁹ It remains to be here stated that this rule has been extended beyond the mere question of statutory construction, and made to apply to all cases where the pending issue is to be governed by some law other than the *lex fori*, and where authoritative expositions of such foreign law can be found proceeding from the courts. * * *

A like authority is conceded to the rulings of foreign courts in the case of adopted statutes or constitutional provisions. "Where a particular statute or clause of the constitution has been adopted in one state from the statutes or constitution of another, after a judicial construction has been given to it in such last-mentioned state, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case."³⁰

But aside from these special and exceptional cases, and generally where the determination of the issue is not complicated with any questions of the applicability of foreign law, decisions rendered in another state may be entitled to respectful consideration, in proportion to the learning and sound judgment which they display, but are not technically of force as precedents. "The doctrine of *stare decisis* is only applicable in its full force within the territorial jurisdiction of the courts making the decisions, since there alone can such decisions be regarded as having established any rules. Rulings made under a similar legal system elsewhere may be cited and respected for their reasons, but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to the judicial mind."³¹ It should also be noted that a decision

²⁹ See ante, p. 381.

³⁰ Cooley, Const. Lim. 52. And see ante, pp. 32, 159.

³¹ Cooley, Const. Lim. 51. The author's citation of cases has been omitted.

which is good authority at home may be of no value in another jurisdiction, on account of differences in the legal systems of the two states. For instance, if the judgment in the case turns entirely upon the provisions of a statute, it will not be available in another state, unless the statute law of the latter jurisdiction is substantially the same in this respect. So also, if the decision is made in accordance with some local custom or some settled peculiarity of the law of the state in which it was given.

CHAPTER VII.

PERSONS AND THINGS.

From Markby's Elements of Law, §§ 125-133; 135-145.

THINGS REAL AND IMAGINARY.

The terms "persons" and "things" occur very frequently in law, and it is necessary to try and get some idea of what we mean by them. I will first deal with the term "thing." In its narrowest and strictest sense, a thing is a permanent, sensible object, other than a person. But it is sometimes used to denote any object, real or imaginary, about which we can speak or think. To its use in this extended sense there can be no objection, provided it be understood that we cannot give physical attributes to imaginary objects.

THINGS CORPOREAL AND INCORPOREAL.

Objects which are sensible are what we call corporeal, as land, gold, corn, and so forth. But, if we include amongst things those objects which we can conceive, we have two classes of things, corporeal and incorporeal.

Rights are incorporeal things, and the law deals with them as such. Thus, a debt or a patent may be pledged, sold, and transferred either inter vivos or by will. In other words, a right may be itself the object of rights.

Whilst a right is itself necessarily incorporeal, the object of the right may be either corporeal or incorporeal. Thus, if A. owe a debt to B., the object of B.'s right is money, and is corporeal; but the debt itself treated as the object of pledge or sale or bequest is incorporeal.

THINGS MOVABLE AND IMMOVABLE—THINGS REAL AND PERSONAL.

Things are divided into movable and immovable, and this division corresponds to an obvious physical distinction. This division of things is not much in use in England. English lawyers prefer to divide things into real and personal. A learned modern author suggests that the terms "real" and "personal" were not in use prior to

the seventeenth century.¹ But I find them used, apparently as familiar expressions, in the reign of Henry the Seventh.² It is not unlikely that the terms "real" and "personal" are connected with the division of actions in the Roman law into actions in rem and actions in personam. The actio in rem of the Roman law was founded on what was called a "jus in rem"; the actio in personam, upon a "jus in personam." I shall explain the terms "in rem" and "in personam" more fully hereafter. It is sufficient to say now that a jus in rem is a right of ownership, or a right available like ownership against persons generally, whilst a jus in personam is a right available against an individual, or against determinate individuals. Now, English lawyers also divided actions into real and personal; and the real action, like the actio in rem, was based upon a jus in rem, whilst the personal action, like the actio in personam, was based upon a jus in personam. But in the English law there was a further distinction between real and personal actions, a distinction of which the Roman law knew nothing. In a real action the very thing itself could be recovered in specie, and the judgment could not be otherwise satisfied. In a personal action the judgment could always be satisfied by the payment of a sum of money. But, further (and this is the point of connection we are seeking for), a real action could only be brought in respect of immovables, and hence immovables got the name of "realty." Movables, on the other hand, were always sued for in a personal action, and got the name of "personalty."

In a general way, therefore, real things, in the English law, were things which could be recovered in a real action,—in other words, land and rights over land,—and all things which could not be so recovered were considered as personal. If there were any things, the nature of which was doubtful, they were set aside as mixed; and for some purposes of procedure this rough classification was sufficient. But the classification of things into real and personal had to be applied to a purpose for which greater accuracy was requisite. Real things, at a man's death, go to his heir, and personal things to his executor or administrator. Everything in its turn, therefore, has had to be marked as real or personal. * * *

¹ Williams, Real Prop. p. 7 and note.

² Year Book, 6 Hen. VII., fo. 9.

PERSONS.

Persons are human beings capable of rights. To constitute a human being capable of rights, two things are necessary,—birth and survival of birth.

WHAT CONSTITUTES BIRTH.

There are expressions to be found in English law books which look as if the *fœtus*, or even the embryo, in the mother's womb, were capable of rights.³ Thus, we find it said that the unborn child may take by devise or inheritance. But I think the true meaning of this is, not that the unborn child really takes, but that the right is reserved for the child until the moment of its birth. This appears also to be the view of the best German jurists.⁴

What constitutes birth has been very carefully considered by English lawyers in reference to the very common charge of child murder. If the child has not been born, the charge of murder cannot be sustained. The question, therefore, what constitutes birth, is in these cases a very important one. The main circumstance which constitutes birth, so as to render a charge of murder sustainable, is complete separation from the mother.⁵ Nothing is said about maturity, but the use of the word "child" seems to assume that the *fœtus* must have assumed the human shape. The child must also be born alive. There is no other express requirement.

DEATH.

A human being ceases to be a person at death. The determination of this event presents no difficulties of the kind we have been considering. If the body is under view, there is rarely any difficulty in determining whether or no it has ceased to live. But if a man leaves his home, and gives up all communication with his family and friends, so that all trace of him is lost, then it becomes very

³ 1 Bl. Comm. 130.

⁴ Unger, Syst. d. österr. allgem. Land-R. vol. 1, p. 232; Windscheid, Lehrb. d. Pandekten-R. § 52; Vangerow, Lehrb. d. Pandekten, § 32. See Dig. 1, 5, 7; 50, 16, 129.

⁵ Steph. Dig. Cr. Law, art. 218. The division of the navel string is not necessary.

difficult to determine whether or no he is alive or dead. So, also, it is sometimes difficult to determine at what exact moment death has taken place, if that determination is necessary. There are certain rules which are intended to obviate these difficulties, but these belong to the head of evidence.

RIGHTS AND DUTIES ATTACHED TO AGGREGATES OF PERSONS.

Rights and duties are sometimes attached to an aggregate of human beings in such a way that the individuals composing the aggregate are altogether lost sight of; that is, the aggregate is looked upon as a single person (a fictitious one, of course), to whom the rights belong, and upon whom the duties are imposed. Strange as this conception appears to us when we come to reflect upon it, yet it is very common. As a familiar example of it, I will take the case of the University of Oxford. The University of Oxford is an aggregate of persons, consisting of the chancellor, masters, and scholars. In common language, the university is said to own a large amount of property; to make contracts; to buy and sell; to bring and defend actions. This language is perfectly accurate. These things are done, but, in the eye of the law, not by any individual member of the university, but by the university as a whole. And the complete distinctness of the university, as a person, from the individual members which compose it, is seen by this: that if any member of the university occupies, say, a house belonging to the university, he occupies it, not as being himself owner, but as tenant or licensee of the university. So, also, if a member of the university were to intrude upon the property of the university, he would commit a trespass. So, also, if I were to make a contract with the university, there would be no "vinculum juris" whatsoever between myself and the individual members of the university. The contractual relation would exist between me and the fictitious person called the "university" alone. The university is always present to our minds as the person to whom the rights and duties are attached.

RIGHTS ATTACHED IN EARLY TIMES TO FAMILIES.

The attribution of a capacity for rights and duties to an imaginary person is not to be looked on simply as the resource of an advanced and highly-technical system of jurisprudence. The idea, though it

has received considerable modern development, reaches far back into antiquity. Some of the earliest legal conceptions we meet with are those in which rights and duties are attached, not to single individuals, but to families. Now, a family is an aggregate which in early times formed such an imaginary person as I have been describing. In early times the homestead, the cattle, and the household utensils are spoken of in law as belonging, not to the individuals who composed the family, but to the family itself. The reason of this I take to have been the simple one that the law did not advance beyond the threshold of the family residence. The rights of the family *inter se* (if it could be said that there were any) were not yet legal rights. They were disposed of, not by the law, but by the family council. It was enough, therefore, for the law to say that the rights belonged to the family *en bloc*, without defining them any further. But, even after the rights of the individual members of the family *inter se* began to be legally recognized, the conception of the family as the subject of legal rights and duties still remained, and was extended to artificial aggregates.

JURISTICAL PERSONS—HOW CONCEIVED BY CONTINENTAL LAWYERS—
NEED NOT BE AGGREGATES OF PERSONS.

Continental lawyers call an imaginary person to which rights and duties are attributed a "juristical person." A juristical person is generally an aggregate of real persons, but there is no difficulty in creating an imaginary person which does not contain any real person. Thus, under the Roman law, there was an interval between the death of a person, and the assumption of the inheritance by his successor. During this period the Roman lawyers found it very inconvenient that there should be no one to represent the estate. Accordingly they made the estate itself into an imaginary person, or, as the phrase was, "*hæreditas personæ vice fungitur*." So, in order to have some person who could represent the claims of the public, they created another imaginary person, called the "*fiscus*" or "*treasury*."

HOW THEY ARE CREATED.

There is a natural tendency, whenever we consider a group of rights and duties as connected with a particular subject, to speak of

them as belonging to that subject.⁶ For example, if property be given for the maintenance of a hospital we naturally speak of it as "belonging to the hospital." So, if a contract is made with some three or four persons who are jointly carrying on trade, we speak of it as a contract "made with the firm." So, when a man has become insolvent, we speak of the property which is divisible amongst his creditors as "belonging to his estate." So, also, we speak of rent being due from the land.

If the rights and duties thus spoken of were really attributed to the hospital, the firm, the estate, or the land, there would in each case be a juristical person. But, if we examine these cases more closely, we shall often find that there is a natural person to whom the right or duty in question really belongs, and that these expressions are only used to indicate the extent of the right or duty, and how it is transferred. Thus, when we say that an estate is liable for a debt, we generally mean that the owner of the estate is liable, but that the liability can only be enforced by seizing or selling the estate, and that on the transfer of the estate the liability passes over to the transferee. If that is our meaning, there is no juristical person, but only the use of a figurative expression which indicates shortly the legal situation, but does not fully or accurately describe it.

DIFFERENCE OF OPINION AMONGST CONTINENTAL LAWYERS—OPINION OF ENGLISH LAWYERS.

All lawyers agree that juristical persons should be created to some extent. But there is a good deal of difference of opinion as to what is, and what should be, necessary for their creation. Some persons would allow that the estate of a deceased person is a juristical person,⁷ but would not allow that the public treasury is so. Others, again, who would admit the public treasury, would not admit the land subject to burdens. The real question seems to be that just indicated. To whom do the rights and duties belong? The person who in a court of law, or in a legal transaction, represents those rights

⁶ This tendency is by no means confined to lawyers and to legal relations. In common language, we use such expressions as "a school gaining a distinction."

⁷ See Sav. Syst. d. h. Röm. Rechts, § 89; Unger, Syst. d. österr. allgem. Privat-Rechts, vol. 1, p. 317; Holzendorff, Jurist. Eucyc. s. v. Stiftungen.

and duties,—is he acting on his own behalf, or on behalf of some fictitious creation which acts through him? This is substantially the same question, and it is in this latter form that it is generally put by English lawyers. When an inquiry is made whether a particular thing or aggregate is a juristical person, they always consider one point only, namely, whether or no it has capacity to act. If it has capacity to act, it is a juristical person, otherwise not.

JURISTICAL PERSONS ACT THROUGH THEIR REPRESENTATIVES.

Of course, this capacity to act is also an ideal capacity, though it produces real effects. An ideal being can never really act, but it can be represented by a real person who can act, and can create duties and obligations on behalf of the juristical person by way of representation. The act of the representative, though not so in reality, may conveniently be treated, as to all its legal effects, exactly as if it were the act of the juristical person; and, where the ideal creation has this capacity of acting through a representative, English lawyers allow that it is a juristical person, or, as we call it in England, a corporation. And the term “corporation” with us implies the attribution of the capacity to act through a representative. This is so clear, that, when a corporation is created, the capacity to act need not be specially granted. So far as it is possible that acts should be done through a representative, it will be presumed that a corporation may do those acts, provided that they are consistent with the purpose for which the corporation was created.

CORPORATIONS IN ENGLAND ARE ALWAYS AGGREGATES OF PERSONS, BUT A CHANGE IN THE MEMBERS DOES NOT AFFECT THE CORPORATION.

All corporations in England consist of aggregates of persons, but, as appears from what has been already said, the juristical person, the corporation, is something totally distinct from the persons who compose it; and hence it follows that no change in the persons who compose the corporation produces any change in the corporation. If one shareholder goes out of a company which is a corporation, and another comes in, the corporation still remains the same corporation as before. The shareholders of the New River Company must have been all changed over and over again since its formation, and yet the juristical person, the corporation, to whom all the rights and

duties are attached, has been one and the same continuously from its creation.

EVEN ALTHOUGH THE MEMBERS MANAGE THE PROPERTY OF THE CORPORATION IN THEIR OWN INTEREST.

The view that the individual members of the corporation are not the owners, not even the co-owners, of the corporate property, which is undoubtedly the true view, is sometimes obscured by the circumstance that the members of the corporation have in their own hands the management of the property of the corporation, and have also a right to apply the profits of it to their own use. Thus, in a municipal corporation, or corporation of a town, the freemen, who are the persons who compose the corporation, have very often the right to regulate the common lands adjacent to the town, and to turn out their own cattle there. So, too, a shareholder in a railway company has a right to vote at meetings, and to receive his share of the profits of the undertaking. Still, the freeman has only what is called a "jus in alieno solo," just as he might have if he were not a freeman. So the shareholder's right to his dividend is a claim by him against the company,—a debt due to him from the company. If he were to help himself to his dividend out of the company's cash box, he would commit a theft.

CORPORATIONS—HOW CREATED IN ENGLAND.

A corporation can, of course, be created by act of parliament, and many corporations are so created. The queen has also power to create corporations by letters patent under the great seal. Private persons cannot create a corporation at their own will and pleasure, but, under the authority and restrictions of certain acts of parliament, any number of persons, not less than seven, may, by following the prescribed forms, become a corporation.

CORPORATIONS SOLE.

There is a curious thing which we meet with in English law, called a "corporation sole." A corporation sole is always some sort of officer,—generally an ecclesiastical officer. Rights and duties are frequently attached to an officer for the purposes of his office only. When an officer vacates his office, these rights and duties pass to his

successors; and, it being convenient to distinguish the rights and duties which attach to a man *jure proprio* from those which attach to him *jure officii*, it is permissible to speak of the latter as attached, not to the man, but to his office, just as it is permissible to speak of rights and duties which pass with the land from owner to owner, as attached to the land. But this language is merely figurative, and there is no doubt that as in the one case the rights and duties spoken of as attached to the land are really attached to the natural persons who are successively owners of the land, so in the other case the rights and duties spoken of as attached to the office are really attached to the natural persons who are the successive holders of the office. The term "corporation sole" is therefore, as it appears to me, a misnomer. The selection of persons who are styled "corporations sole" is a purely arbitrary one. The queen is said to be a corporation sole, and so is a parson. But the secretary of state for India is not so, nor is an executor, though there is at least as good reason why both these persons should be treated as corporations sole as a parson. And, on an examination of the position of so-called corporations sole, it will be seen that they are not really juristical persons, but only natural persons peculiarly situated as regards the acquisition and incurring of rights and duties.

CHAPTER VIII.

RIGHTS.

- § 1. Nature of Rights.
- 2. Classification of Rights.

§ 1. Nature of Rights.

From Holland's Elements of Jurisprudence, 71, 72.

What then is a 'legal right'? But first, what is a right generally?

It is one man's capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or the force of society.

When a man is said to have a right to do anything, or over anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular way, with approbation, or at least with acquiescence; but would reprobate the conduct of any one who should prevent him from doing the act, or making use of the thing, or should fail to treat him in that particular way.

A 'right' is thus the name given to the advantage a man has when he is so circumstanced that a general feeling of approval, or at least of acquiescence, results when he does or abstains from doing certain acts, and when other people act or forbear to act in accordance with his wishes; while a general feeling of disapproval results when any one prevents him from so doing or abstaining at his pleasure, or refuses to act in accordance with his wishes. Further than this we need not go. It is for Psychology to inquire by what, if any, special faculty the mind is capable of affirming or denying the existence of rights. History may also to some extent unravel for us the growth of such conceptions, as to rights, as are now prevalent; and these are among the most vexed questions of Psychology and of the History of Civilisation respectively. Jurisprudence is absolved from such researches. The only conception of a Right which is essential to her

arguments is that which we have already proponnded, and about the truth of which, as far as it goes, there can be no question.

Jurisprudence is specifically concerned only with such rights as are recognised by law and enforced by the power of a State. We may therefore define a 'legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others.

That which gives validity to a legal right is, in every case, the force which is lent to it by the State. Anything else may be the occasion, but is not the cause, of its obligatory character.¹

Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus, on the one hand, the ownership of land is a power residing in the landowner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject and exercised over his child as its object, available against all the world besides. On the other hand, a servant has a power residing in himself as its subject, over no tangible object, and available against his master to compel the payment of such wages as may be due to him.

If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the State to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the State. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as was stated previously, for the definition and protection of rights.

We have seen that a 'moral right' implies the existence of certain circumstances, with reference to which a certain course of

¹As Thomasius says of 'Pactum,' 'non est causa sed tantum occasio obligationis.'

action is viewed with general approbation, and the contrary course with disapprobation; that a 'legal right' exists where the one course of action is enforced, and the other prohibited, by that organised society which is called 'the State.'

THE ELEMENTS OF A RIGHT.

We have next to consider more particularly what is the character of those elements from which a Right results.

They are

- (1) A person 'in whom the right resides,' or who is 'clothed with the right,' or who is benefited by its existence.
- (2) In many cases, an object over which the right is exercised.
- (3) Acts or forbearances which the person in whom the right resides is entitled to exact.
- (4) A person from whom these acts or forbearances can be exacted; in other words, against whom the right is available; in other words, whose duty it is to act or forbear for the benefit of the subject of the right.

The series of elements into which a Right may be resolved is therefore:

The Person entitled.		The Object.		The Act or Forbearance.		The Person obliged.
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It will be observed that the first and the last terms of the series are a person. The second term is the object of the right (whether it be a physical thing, or what the law chooses to treat as such) if any (for there exist large classes of rights which have reference to no object, either physical or assimilated to such); and the third term is made up of the acts or forbearances to which the person in the fourth term is bound.

It will be convenient to call the person entitled 'the person of inherence'; and the person obliged, 'the person of incidence.' The intermediate terms may be shortly referred to as 'the object' and 'the act' respectively.

That this series is no technical abstraction but a simple formula for the representation of the indisputable elements of a right, may be more apparent from an example. A testator leaves to his daughter a silver tea-service. Here the daughter is the 'person of in-

herence,' i. e. in whom the right resides; the tea-service is the 'object' of the right; the delivery to her of the tea-service is the 'act' to which her right entitles her; and the executor is the 'person of incidence,' i. e. the person against whom her right is available. Or take an example of a right where, as we stated to be often the case, the second term of the series is wanting. A is B's servant. Here B is the 'person of inherence,' reasonable service is the 'act' to which he is entitled, and A is the 'person of incidence,' against whom the right is available. The nature of the right varies with a variation in any one of the four terms which are implied in it, and the variations in the nature of the right give rise to the main heads or departments of law.

§ 2. Classification of Rights.

RIGHTS IN REM—RIGHTS IN PERSONAM.

From 1 Austin's Jurisprudence, § 509.

I proceed to distinguish rights in rem from rights in personam, which I do shortly as follows:

Rights in rem are those which avail against persons generally. Rights in personam are those which avail exclusively against certain or determinate persons.

This distinction is one which pervades the writings of the Roman lawyers, and is assumed by the Roman institutional critics as the main groundwork of their arrangement. Nevertheless, the terms "jus in rem," "jus in personam," are not explicitly adopted by these writers to indicate the distinction. These terms were devised by the civilians who wrote subsequently to what has been termed the revival of the study of Roman Law, and I adopt them as the terms which most adequately and least ambiguously express the distinction.² "Jus in personam certam sive determinatam," is expressive and free from ambiguity. Cut down to "jus in personam" it is also sufficiently concise. "Jus in rem," standing by itself,

² "The same opposition has also been denoted by the less descriptive terms 'jus in re' and 'jus ad rem,' which first occur in the canon law, and by the terms 'absolute' and 'relative,' which, by employment with many other meanings, are too void of precision for the purpose." Holland, Jur. 129.

is ambiguous and obscure. But when it is contradistinguished to *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed.

And here I must make a remark as to what "*jus in rem*" does not mean. Recurring to the phrase I have already used in styling persons and things the subjects of rights, that phrase might be varied by saying that the rights exists over, in, or to a thing. And, as I have already indicated, I employ these expressions only in the case of rights which avail against persons generally. The student might be apt to infer that "*jus in rem*" means a right over, in, or to a thing. He would be wrong. I do not say that the ideas are historically unconnected; but, however that may be, the phrase "in rem," as here used, denotes not the subject, but the compass of the right. It denotes that the right in question avails against persons generally, and not that the right in question is a right over a thing. For many of the rights which are rights in *rem* are either rights over or to persons, or have no subject (person or thing)..

These two classes of rights are further distinguishable thus: The duties which correlate with rights in rem are always negative: that is to say, they are duties to forbear or abstain. Of the obligations which correlate with rights in personam, some are negative, but some (and most) are positive; that is to say, obligations to do or perform.

I shall now briefly give a few instances to illustrate the character of the rights comprised in these two great classes respectively.

Instances of rights in *rem* are: (1) Ownership or property. This is a term of such complex or various meaning that I must defer the full and accurate explanation of it. But, for the present purpose, the following is a sufficient definition of "ownership" or "property": "The right to use or deal with some given subject in a manner or to an extent which, though not unlimited, is indefinite."

Now, in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right; that is to say, all other persons are bound to forbear from acts which would prevent or hinder the enjoyment or exercise of the right.

But here the duties which correspond to the right of property terminate. Every positive duty which may happen to concern or re-

gard it, and every negative duty regarding it which binds exclusively certain persons, is not a duty properly corresponding to the right of property, but to some right collateral to the right of property, and flowing from some incident specially binding the person upon whom the duty is incumbent, e. g. from a covenant with the owner, or from a breach of one of the negative duties which properly correspond to the right of property, as a trespass laying the trespasser under the duty to make reparation.

Ownership or property is therefore a species of *jus in rem*. It is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. The obligations implied by it are also negative as well as universal.

Where the subject of a right in *rem* happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) over or to the subject, as against other persons generally. He has also rights (in *personam*) against the subject, or lies under obligations (in the sense of the Roman lawyers) towards the subject. I shall revert to this matter.

) The servitudes of the Roman law, and of the various modern systems which are modifications of the Roman law, may also be abstracted as examples of rights in *rem*.

Servitus (for which the English "easement" is hardly an adequate expression) is a right to use or deal with, in a given and definite manner, a subject owned by another. Take, for instance, a right of way over another's land. According to this definition, the capital difference between ownership and *servitus* consists in this: that in the former case the right of dealing with the subject is larger and indeed indefinite, in the latter case narrower and determinate. But each is a right in *rem*. For *servitus* avails against all mankind (including the owner of the subject). It implies an obligation upon all (the owner again included) to forbear from every act inconsistent with the exercise of the right.

But this negative and universal duty is the only obligation which correlates with the *jus servitutis*. Every special obligation which happens to regard or concern it is a duty answering, not to the *jus servitutis*, but to some right extraneous or merely collateral to it, e. g. the owner of the subject may have granted an easement over it, and covenanted with the grantee for quiet enjoyment. The gran-

tor here lies under two duties which are completely distinct and disparate, although the objects of the duties are the same. One of these duties arises from the grant, and thereby he is bound, like the rest of the world, to forbear from molesting the grantee in exercise of the right created by the grant. The other arises from the contract by which he is specially bound.

Instances of rights in personam are:

(1) A right arising from a contract.

Rights which, properly speaking, arise from contracts avail against the parties who bind themselves by contract, and also against the parties who are said to represent their persons; that is to say, who succeed, on certain events, to the aggregate or bulk of their rights, and therefore to their faculties or means of fulfilling or liquidating their obligations. But, as against all other persons, the rights which, properly speaking, arise from contracts have no force or effect, although, by a confusion of thought, to which I shall revert, rights in rem are sometimes imagined to proceed from contract. This occurs in the case where the same transaction bears the double character of a contract and a conveyance. To avoid in the meantime the effect of this confusion, I assume, in the following example, that we are considering the case on the principles of the Roman law, or of some system of law consciously based on the Roman law.

Suppose you contract with me to deliver some movable (a horse, a garment, or what not); but, instead of delivering it to me, in pursuance of the contract, that you sell and deliver it to another. Now, here, the rights which I acquire by virtue of the contract or agreement are the following: I have a right to the movable in question, as against you specially (*jus ad rem acquirendam*). So long as the ownership and the possession continue to reside in you, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction in case you detain it. After the delivery to the buyer, I can compel you to make me satisfaction for your breach of the contract with me. But here my rights end. As against strangers to that contract, I have no right whatever to the movable in question. And, by con-

sequence, I can neither compel the buyer to yield it to me, nor force him to make me satisfaction as detaining a thing of mine. But if you deliver the movable, in pursuance with your agreement with me, my position towards other persons generally assumes a different aspect. In consequence of the delivery by you, and the concurring apprehension by me, the thing becomes mine. I have now *jus in rem*,—a right to the thing delivered, as against all mankind; a right answering to obligations negative and universal. And, by consequence, I can compel the restitution of the subject from any who may take and detain it, or can force him to make me satisfaction as for an injury to my right of ownership.

(2) Rights of action, with all other rights founded upon injuries, are also *jura in personam*. For they answer to obligations attaching upon the determinate persons, from whom the injuries have proceeded, or from whom they are apprehended.

It is true that difficulties have arisen about the nature of actions *in rem*, i. e. those actions (or rather those rights of action) of which the ground is an offense against a right *in rem*, and of which the intention (scope or purpose) is the restitution of the injured party to the exercise of the violated right. But these and other difficulties besetting the theory of actions, appear to have sprung from this: that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and confounded by expositors of the Roman law. And this confusion of ideas absolutely disparate and distinct seems to have arisen from the abridged shape of the expressions by which rights of action are commonly denoted. By an ellipsis commodious and inviting, but leading to confusion and obscurity, a name or phrase applicable to the violated right is often extended improperly to the remedy. Thus, the phrase "*in rem*" is extended to certain actions, which, though they are necessarily directed against determinate persons, are grounded upon violations of rights availing against all mankind. And thus certain actions are styled "*ex contractu*," although they properly arise from the nonperformance of contracts, and are only remote and incidental consequences of the contracts themselves.

All rights *in personam* are rights to acts and forbearances, and to

nothing more. The species of rights which have been termed "jus ad rem" form no exception. What has been styled "jus ad rem" is an elliptical expression, and is more properly rendered "jus ad rem acquirendam," or still more completely "jus in personam ad jus in rem acquirendum." That is to say, the person entitled has a right, availing against a determinate person, to the acquisition of a right availing against the world at large. And by consequence his right is a right to an act of conveyance or transfer on the part of the person obliged.

From 1 Austin's Jurisprudence, §§ 544-547, 552-555.

Of rights existing over persons, and availing against other persons generally, I may cite the following as examples: The right of the father to the custody and education of the child; the right of the guardian to the custody and education of the ward; the right of the master to the services of the slave or servant.

Against the child or ward, and against the slave or servant, these rights are rights in personam; that is to say, they are rights answering to obligations (in the sense of the Roman lawyers) which are incumbent exclusively upon those determinate individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him as for a breach of the contract of hiring, or as for breach of an obligation (*quasi ex contractu*) implied in the status of servant.

But, considered from another aspect, these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons generally, or against the world at large, and the duties to which they correspond are invariably negative. As against other persons generally, they are not so much rights to the custody and education of the child, to the custody and education of the ward, and to the services of the slave or servant, as rights to the exercise of such rights without molestation by

strangers. As against strangers, their substance consists of duties, incumbent upon strangers, to forbear or abstain from acts inconsistent with their scope or purpose.

In case the child (or ward) be detained from the father (or guardian), the latter can recover him from the stranger. In case the child be beaten, or otherwise harmed injuriously, the father has an action against the wrongdoer for the wrong against his interest in the child; and so on.

And here I may remark conveniently that, where a right in rem is a right over or to a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds. He is merely the subject of the real right, and occupies a position analogous to that of a thing which is the subject of a similar right.

For example, independently of his rights against the child, and independently of his obligations towards the child, the parent has a right in the child availing against the world at large. Independently of his rights against the parent, and independently of his obligations towards the parent, the child has a right in the parent availing against the world at large. The murder of the parent by a third person might not only be treated as a crime or public wrong, but might also be treated as a civil injury against that right in the parent which belongs to the child. * * *

Having cited examples of real rights which are rights over persons, I will cite an example or two of real rights which are not rights over things or persons, but are rights to forbearances merely:

(1) A man's right or interest in his good name is a right which avails against persons, considered generally. They are bound to forbear from such imputations against him as would amount to injuries towards his right in his reputation. It is therefore a right in rem. But there is no subject, thing, or person over which it can be said to exist.

(2) A monopoly, or the right of selling exclusively commodities of a given class (a patent right, for instance), is also a real right. All persons, other than the party in whom the right resides, are bound to forbear from selling commodities of the given class or description. But, though the right is a real right, there is no subject, person, or thing over which it can be said to exist, unless

it be the future profits, above the average rate, which he may possibly derive from his exclusive right to sell.

(3) Many examples of this class of rights might be selected from among "franchises,"—a law term embracing an immense variety of rights, having no common property whatever except their supposed origin, being all of them considered to have been originally granted by the crown. Such, for example, is a right of exclusive jurisdiction in a given territory, or a right of levying a toll at a certain bridge or ferry. The rights in personam which concur with the rights in question (e. g. the rights answering to the obligations on the persons who happen to traverse the bridge) are perfectly distinct from the rights in rem of which the franchise consists, namely, the obligation not to impede the exercise of the jurisdiction, the levying of the toll, or the passage over the bridge, nor to carry passengers across within the limits of the ferry, to the detriment of the exclusive right of the person entitled. * * *

RIGHTS ANTECEDENT AND REMEDIAL.

From Holland's Elements of Jurisprudence, 130.

The last of the great divisions of rights distinguishes those where the act is due for its own sake, from those where it is made due merely on default of another act. The former kind have been by various writers styled rights 'primary,' 'sanctioned,' 'of enjoyment'; the latter kind have been described as rights 'sanctioning,' 'secondary,' 'restitutory,' 'of redress.' We prefer to distinguish them as rights 'antecedent' and rights 'remedial.'

The nature of the distinction is sufficiently simple. The rights of the owner of a garden not to have it trespassed upon, of a servant to have his wages paid, of a purchaser to have his goods delivered to him, are all of the former kind, viz. rights 'antecedent,' which exist before any wrongful act or omission. They are rights which are given for their own sake. The right of the owner of a garden to get damages from a party of men who have broken into his grounds, of a servant to sue his master for unpaid wages, of a purchaser to get damages from a vendor who refuses to deliver the goods sold, are, on the other hand, of the latter kind, or rights 'remedial'; they are given merely in substitution or compensation

for rights antecedent, the exercise of which has been impeded, or which have turned out not to be available.

If all went smoothly, antecedent, or primary, rights would alone exist. Remedial, or sanctioning, rights are merely part of the machinery provided by the State for the redress of injury done to antecedent rights. This whole department of law is, in an especial sense, 'added because of transgressions.'

CHAPTER IX.

ACTS.

From Markby's Elements of Law, §§ 214-247, 254-258, 260-269, 273-277.

ACTS ARE EVENTS UNDER HUMAN CONTROL.

The first thing to be considered is what kind of event is an act. An act, as I understand it, is an event regarded as under human control. There are few, if any, events which can be said to be wholly within human control. There are, on the other hand, few events by which man is in any way affected the results of which might not have been changed had his conduct been different. Few events, therefore, can, strictly speaking, be said to be either altogether dependent on, or altogether independent of, human control. But many events are regarded by the law as under human control, and I know of no reason why they should be so regarded except that the legal result of them depends, in some measure, upon the conduct of the party who has exercised control over them.

I will analyze ¹ a little further the nature of an act. An act is the bodily movement which follows immediately upon a volition. What follows upon an act in connection with it are its consequences. It is necessary to remember this, although, in common language, we often use the word "act" to express both an act and its consequences; as, for example, when we speak of an act of murder.

NO ACT WITHOUT A BODILY MOVEMENT.

Without a bodily movement no act can be done. A silent and motionless man can only forbear.

ACT PROMPTED BY DESIRE—MOTIVE.

Every act is prompted by some antecedent desire which determines the will. This incentive to a determination of the will is called

¹ In this analysis I have closely followed Austin (Lect. 18-21). His explanation seems to me the most intelligible that has been put forward. His authorities are Locke, especially the chapter on "Power" in the essay on Human Understanding (book 2, c. 21), and Brown's Inquiry into the Relation of Cause and Effect, particularly part 1, § 1.

"motive," and without it we should not act at all. It follows that in every act we contemplate some result, namely, the result of satisfying the desire. If I yawn or stretch my limbs, it is to relieve the discomfort of weariness, and I contemplate this relief as the result of my act.

INTENTION.

When the doer of an act adverts to a consequence of his act, and desires it to follow, he is said to intend that consequence.

END NOT ATTAINED DIRECTLY.

The contemplated end of every act is the satisfaction of desire, and this which is the end is also the motive. The end and the motive are only the same thing seen from two different points of view.

The end is rarely attained directly. In common language, a man rarely does an act for the mere sake of doing it. Perhaps we sometimes laugh or shout for no other reason. But generally there are some, and frequently there are many, intermediate events resulting one from another, all of which must happen before my ultimate end or purpose is attained. For example, A. and B. have been competitors for a prize. A. is successful. Thereupon B.'s rage and disappointment are so great that he conceives the desire to do A. an injury. B., accordingly, contrives an elaborate plot to injure A. B. has no immediate satisfaction in carrying out this plot. On the contrary, it causes him infinite pains and trouble, which he would much rather avoid. But he expects and desires, as an ultimate consequence of his act, that, A. having been injured, he will himself find pleasure in the pain suffered by A., and so his own pain of envy will be assuaged. All these intermediate consequences were adverted to and expected, and were therefore intended, but as means only, and not as an end.

ACT ALWAYS INTENDED.

An act must always be intended, although the consequences of an act may not be so; for an act is always the result of a determination of the will which sets the muscles in motion in order to produce that motion as a consequence, even if no other consequence is desired. This excludes from the category of acts the reflex motions of the muscles, and the motions of a man in his sleep.

CONSEQUENCES ADVERTED TO NOT ALWAYS DESIRED OR EXPECTED.

Intention, then, is the attitude of mind in which the doer of an act adverts to a consequence of the act, and desires it to follow. But the doer of an act may advert to a consequence, and yet not desire it, and therefore not intend it.

Adverting to a consequence, the doer of an act may either expect it to follow, or not expect it to follow.

KNOWLEDGE.

Expectation that a consequence will follow, or, as it is sometimes expressed, knowledge that it is likely to follow, without any desire that it should follow, is an attitude of mind which is distinct from intention; and it is not, I venture to think, permissible to treat them as one, as Austin does.²

I shall call this second attitude of mind, in which consequences are adverted to and are expected to follow, but are not desired, "knowledge."

EFFECT OF INTENTION AND KNOWLEDGE ON LEGAL RESULTS OF ACTS.

These two attitudes of mind, in each of which there is advertence to consequences, have the most important effects upon the legal results of acts. There are numberless rights and duties which depend upon the existence of a particular intention or knowledge in the doer of an act, that is, upon the act being done with advertence to particular consequences, and either a desire that they should, or an expectation that they will, follow.

² The framers of the Indian Penal Code, in their definition of "murder," had before them, I think, either Austin's analysis, or a similar one. But they introduce "knowledge" as a state of mind differing from intention. The objection to this term is that it may either mean "knowledge with advertence," or "knowledge without advertence." I think it must mean "knowledge with advertence," in the Indian Penal Code, but it is not quite clear. The framers of the Draft Criminal Code for England have used the word "means" instead of "intends." I do not know what is gained by this. See section 170 of the Draft Code.

MERE ADVERTENCE WITHOUT DESIRE OR EXPECTATION HAS NO EFFECT.

If consequences of an act are adverted to, and are neither desired nor expected, then there is neither intention nor knowledge; and, so far as any legal result of the act depends upon intention or knowledge, it will not ensue. Nor do I think that in any case the simple attitude of advertence, without expectation or desire, has any bearing upon the legal result of an act. But advertence without expectation or desire, if coupled with one other circumstance, does affect the legal result. If consequences be adverted to, and considered as not likely to happen upon grounds which a reasonable man would not consider sufficient, then the legal result in many cases is effected. For example, the doer of an act who stands in this attitude of non-expectation as regards consequences, and who has arrived at this attitude in this reprehensible manner, very often becomes thereby liable, which means that a particular legal result is attached to the act, when, if the same act had been done and the same attitude of mind had been arrived at upon reasonable grounds, he would not be liable. Thus, if I fire at a target, having first taken all proper precautions, and I nevertheless kill a passer-by, I may incur no liability; but, if I do the same act, having first taken only insufficient precautions, I may be guilty of manslaughter.

RASHNESS.

When a person does an act advertent to consequences which, upon insufficient grounds, he expects not to follow, he is said to be rash, and his conduct is called "rashness."

INADVERTENCE.

These are the cases of advertence. I now come to consider cases in which consequences have followed from an act which consequences the doer did not at all advert to. Now, inadvertence, like advertence, without desire or expectation, does not, taken by itself, affect the legal result of an act. But, if the inadvertence is due to an absence of that care and circumspection which a man might reasonably be expected to exercise, then the legal result is very often effected. For example, the doer of an act, in this case also, very often becomes

liable; whereas, if the inadvertence exists in spite of due care and circumspection having been taken, he escapes liability. Thus, if I fire off a rifle without first looking to see whether any one is in the line of fire, and I kill some one, I may be guilty of manslaughter; but if I buy a rifle of a well-known maker, and, without examining it to see if it has any defects, I fire it off, and it bursts, and kills some one standing near, I may incur no liability at all.

HEEDLESSNESS.

When a person does an act without adverting to the consequences, and he has failed to do so because he has not used due care and circumspection, he is said to be heedless, and his conduct is called "heedlessness."

Acting with intention, acting with knowledge, acting with rashness, and acting with heedlessness, are four different conditions affecting the legal result of the act done. It is obvious that in the explanation I have given of these terms there is no pretense of complete scientific accuracy. The explanation I have given may even be open to objection on psychological grounds. But these terms are in daily use by lawyers, who by means of them describe the conditions under which legal results ensue. I have therefore endeavored to state what I conceive to be meant by these terms. If lawyers attach any other meaning to them, or if, with the meaning I have attached to them, they express ideas which are false, let this be stated, and the error rectified. But, at any rate, let us endeavor to understand what we ourselves mean; and, when we have arrived at a meaning, let us adhere to it.

OTHER CONDITIONS OF MIND THAN THOSE DESCRIBED.

If an event be adverted to, the expectation of its happening may vary very greatly, and it is conceivable that the legal result should be made to depend upon the strength of the expectation. So there are degrees of reprehensibility in rashness and heedlessness which we endeavor sometimes to express by the use of such words as "gross" or "crass." So, the Roman lawyers spoke of "*culpa lata*," "*culpa levis*," and "*culpa levissima*," "*diligentia*," and "*exacta diligentia*." These terms assume the possibility of assigning so many different standards by which to measure conduct. I do not think the use of

them, or the neglect of them, affects the analysis of the mental attitude of the doer of an act which I have given above.

FORBEARANCE.

A forbearance is the determination of the will not to act. It is inaction or omission, together with advertence to the act which is not done, and a determination not to do it. A forbearance, therefore, like an act, is always intended. The consequences of a forbearance may be desired or not desired, expected or not expected, adverted to or not adverted to; and there will accordingly be intention, knowledge, rashness, or heedlessness, under the same conditions as in the case of acts. It is not, therefore, generally necessary to distinguish forbearances from acts.

MENTAL CONDITION WITHOUT ACT PRODUCES NO LEGAL RESULT.

It is, I believe, generally agreed that a mere mental condition, unaccompanied by any external act, is, legally speaking, nullius momenti, and produces no legal result whatever. This might well be so for the simple reason that such a mental condition would in most cases be undiscoverable. It may also perhaps be doubtful whether the mental condition is sufficiently under our control to justify legal results being based upon it.

LEGAL RESULT OF AN ACT GENERALLY NOW DEPENDENT ON MENTAL CONDITION.

There are, of course, many cases in which the legal results either of an act or of a forbearance are wholly independent of the mental attitude of the person who acts or forbears. But in modern times the number of these cases has been considerably reduced. And some of these very cases illustrate very strongly the prevalence of the idea that the legal result of an act ought to depend upon the mental condition of the doer. For example, it has been said to be the law in England that, wherever A. so conducts himself towards B. that B. may reasonably infer the existence of an intention on the part of A. to do something, the legal result is the same as if that intention existed, whether it really exists or not. And these cases are always put as cases of estoppel; that is, the intention to do this thing is assumed to exist, whether it exists or not. It would be much

simpler to attribute the legal result to the act without any reference to the intention of consequences: but no one has ever thought of doing this, so wedded are we to the view that the legal result of an act must depend on the mental condition of the doer of it as regards these consequences.

THIS VIEW HAS BEEN RECENTLY DEVELOPED.

No doubt, the view that the legal result of an act depends upon the attitude of the doer as regards the consequences has been much developed in later times. We always find in the earlier stages of law much more attributed to the act, and much less to the attitude of the doer's mind. * * * The same disregard of intention of consequences is observable in the early English law. In early times a deed was looked upon as valid and binding, not as a formal expression of intended consequences, but as an outward and visible solemn act. Only a deed made within the jurisdiction and process of the court could be relied on in an action of debt. And a deed sealed by a party's seal might be good against him even though the seal had not been affixed by him or by his directions.³ This conception of a deed as something which in itself produces a legal result, apart from intention, was, no doubt, the origin of the classification of contracts into contracts by deed and contracts by parol.

There is a very important class of acts in which the legal result follows because that result was itself contemplated and desired as one of the consequences of the act. From the fact that legal results are in contemplation in this class of acts, Germans call them "*Rechtsgeschäfte*." Frenchmen call them *actes juridiques*. English lawyers have not yet agreed upon any name for them. The terms "*juristic acts*" and "*acts in the law*" have been suggested. In all such acts the doer (as the phrase is) "*expresses his intention*"; that is, he indicates, or is supposed to indicate, by some means or other, that he desires something.

³ See Pol. Cont. (3d Ed.) p. 151. So, an accidental destruction of the seal would make the deed void. Sheph. Touch. (Ed. 1780) p. 67. Under Mahomedan law, if a husband uses words of divorce, they are effectual, whatever may have been his intention. Baillie's Digest of Mahomedan Law, p. 208. Some of the rules relating to seisin were founded on the notion that the act, without any reference to the intention, was effectual.

It is probable that before long English lawyers will follow the example of continental lawyers, not only in appropriating a name to acts of this class (and whether they are called "acts" in the law, or "juridical acts," or "juristic acts," does not seem to me very material), but also in discussing them generally. If we take the commonest examples of this class, contracts, sales, mortgages, wills, and settlements of property, we shall find that up to a certain point the principles which regulate them are very nearly the same. The mode in which the intention is ascertained, the effect of fraud, misrepresentation, mistake, undue influence, and agency, are, or at any rate might be, and ought to be, much the same in all. Brevity and simplicity, therefore, is attained by discussing these principles once for all; and this I have endeavored to do to some extent, though in the present condition of English law it is not possible to carry the discussion very far.

MENTAL CONDITION, HOW ASCERTAINED.

A man's mental condition at any given moment, and his conduct in arriving at that condition, are facts, and, like any other facts, if disputed, they must be proved. There is a special set of rules which the law has prescribed for the conduct of an inquiry into the existence of disputed facts, which are called "rules of evidence"; and there are special rules of evidence applicable to the inquiry into the particular facts of a man's mental condition at the time when he does an act, and his conduct in arriving at that condition. These rules I shall consider under the head of "Evidence."

RULES FOR ASCERTAINING.

Whatever may be thought of the wisdom of judges in early times in disregarding to the extent they did the attitude of the doer of an act as regards the consequences of it, there can be no doubt that the difficulty which they apprehended in ascertaining this condition was not an imaginary one. The mental condition of a person at any time is, unless he chooses to inform us of it, a matter which it is very difficult to ascertain. The inquiry into the conduct by which he arrived at that condition is no less difficult. Yet it is into inquiries of this kind that modern judges, and even modern juries, are daily called upon to enter. There may in some cases be evidence, of the usual

kind, of motives which are likely to lead to the absence or presence of the intentions imputed. Means of knowledge may also exist from which knowledge may be inferred, and other circumstances may indicate advertence. It is also probable that an ordinary man adverts to and expects the ordinary consequences of his acts. And there are standards of conduct supplied by experience by which heedlessness and rashness may be determined. But it cannot be denied that we generally arrive at a conclusion as to a man's attitude with regard to the consequences of his act by a very rough method. We compare the conduct of the person doing an act with that of an average man; and, by this comparison, we determine whether or no he was acting intentionally or heedlessly or rashly. Thus, if a man uses language which, under ordinary circumstances, would mean one thing, while the speaker protests that he has used it to express another, very little attention would be paid to this protest.* We are compelled, when we wish to determine what was intended by the words used, to consider how a man of ordinary intelligence would understand them. So, if a man rides over another in the street, it is determined whether he is rash or heedless by considering whether he has acted as an average man ought to act. Such cases might seem to suggest that the reference of the legal result of an act to the mental attitude of the doer of it in relation to the consequences is but a pretense after all. This, however, would be an erroneous conclusion. If an act produced a legal result merely because a particular person did it, and not at all because of the mental attitude of that person as regards the consequences when he did it, then the existence of circumstances affecting that attitude would have no effect. But, to take the examples I have just put, we do not, because of the language used by him, impute intention to an insane person, nor do we treat him as rash or heedless because his conduct differs from the ordinary standard of carefulness.

Perhaps as strong a case as any which could be put is the following: Suppose A. to have made a will giving in due form a legacy

* This is not upon the doctrine of estoppel (a doctrine which English judges are rather fond of resorting to, to get them out of all difficulties), but it is one of the rules for inferring intention. If there is no intention, then there must be rashness, heedlessness, or breach of duty to make the party liable. See 2 Smith's Lead. Cas. (7th Ed.) p. 870.

to B. Suppose, further, that A., after having made his will, declares, in the presence of several persons whose credit is unimpeachable, that he has altered his mind, and that he revokes the legacy. Now, a will is an event in which more than in any other case the legal result depends upon that mental condition which is called the "intention" of the testator. The whole object is to fulfill the testator's wishes. B. will, nevertheless, in the case put, take the legacy. This is because we are in the habit of arriving at a conclusion as to the existence of a testator's intention by an artificial method,—by looking only at what he has written and signed in the presence of witnesses, and to nothing else, however trustworthy it may be. Now, every artificial method of inquiry into the truth of alleged facts, though, taken on the whole, it may serve the cause of truth in the majority of cases, always involves error in a minority, and the case I have put is one of the minority. But still, even in the case of a will, the legal result is not independent of the intention. We refer to the surrounding circumstances to explain the directions of the will. We ask what were the motives which induced it. We inquire into the state of the testator's mind. And the legal result may be modified by these inquiries. If the legal result of the act were altogether independent of the intention, these inquiries would be altogether fruitless.

RULES OF CONSTRUCTION.

It is the same with what are called "rules of construction," by which I mean those rules which have been laid down for determining what inference is to be drawn as to intention from express manifestations of it. These rules, like the rules of evidence just now referred to, are artificial; and there is no doubt that it is possible, by the application of such artificial rules, to miss the real intention. It is, however, supposed that, by the application of these rules, the intention is better ascertained in the general run of cases than in any other way. The supposition may or may not be correct, but there is no doubt whatever that, whether the rules are really useful or not, the legal result is still connected with the intention. Thus, we constantly hear judges lamenting the result to which some established rule of construction drives them, because they think that this is not what was intended. But the intention which is thus pre-

sumed is always treated as a real intention. If there has been fraud or undue influence, or the party using the expressions under consideration is insane, the result is modified accordingly. We never now go back to the view of earlier times, and say that the act alone is conclusive. English judges have sometimes said, when applying these arbitrary rules of construction, and referring to the person whose intentions are in doubt, that they will consider, "*non quod voluit, sed quod dixit.*" Roman lawyers, who were less fettered by rules of construction, used to say, "*non quod dixit, sed quod voluit.*" Still the situation of all judges is the same. They can only infer the intention from the language, and, in drawing that inference, they must be liable to err, because they must be guided by their experience as to what ordinary persons would mean by the terms used.

ACTS OF WHICH THE OBJECT IS TO MANIFEST INTENTION.

There are, as I have already pointed out, some acts of which the very object is to manifest the intention of the person who does them; and these manifestations of intention play a very important part in law, because to a very large extent the mere fact that a legal result is intended and expressed to be intended is sufficient to induce it. The connection here between the expressed intention and the legal result is so immediate that we often speak as if the legal result was due to no other agency than that of the party or parties expressing the intention. This way of looking at the matter is, however, not strictly correct; and, although the inaccuracy is sometimes harmless, it has, I think, led to some confusion. It seems in some cases to have been thought that it was an easier process to arrive at liability where there was intention than where there was none; it being apparently forgotten that the affixing of liability is an independent process, to which the one preliminary requisite, and the only one, is the sovereign will. It is, probably, in consequence of some misunderstanding as to the origin of liability that we occasionally find judges making desperate efforts to base liability upon intention, when they might just as well have explained it without any reference to intention at all. For example, the struggle to explain the right to recover back money paid by mistake by an imaginary intention on the part of the payor to repay it seems to me to be labor wholly thrown away.

FORMAL AND INFORMAL MANIFESTATIONS OF INTENTION.

Manifestations of intention may be either formal or informal. A formal manifestation of intention is a manifestation of intention made in accordance with certain forms which the law has prescribed as necessary for producing a legal result. Forms are useful for four reasons: First, to make us act with deliberation; secondly, to distinguish the preparations which often precede a final determination from the final determination itself; thirdly, to facilitate proof; fourthly, to give publicity to the act.

EXPRESS AND TACIT.

Manifestations of intention may also be express or tacit. An intention is manifested expressly when it is manifested by any means which are resorted to for that purpose. It is tacitly manifested by any means which, though not resorted to for that purpose, have the effect of disclosing it. The commonest ways of manifesting an intention expressly are by speaking and writing, but any action of the muscles, such as a nod or a wink, may be used for that purpose, provided only that it is understood.

SURROUNDING CIRCUMSTANCES.

When we infer the existence of intention from an act or acts not done for the purpose of manifesting it, we always look at the surrounding circumstances to see what light they throw upon the action. How far we can look at the surrounding circumstances to explain acts which are done for the express purpose of manifesting intention has not, I believe, been discussed generally, but only in reference to those manifestations which we call "contracts." I shall not, therefore, discuss that question here, further than to observe that the permissibility of a resort to the surrounding circumstances depends in some measure upon whether the manifestation of intention, besides being express, has also been formal.

I have referred to the distinction between express and tacit manifestations of intention because it is one frequently made. There seems, however, to be a disposition to attribute to it more importance than it deserves. In some things which are said upon the subject there seems to lurk a notion that an express manifestation

of intention and a tacit manifestation of intention operate in different ways. I do not think that this is the case. Whether the manifestation be express or tacit, the endeavor is to decide on the existence of the intention.

ACTION THROUGH AN INTERMEDIARY.

I have already said that no one can do an act without putting his own muscles into motion. But a man very often does no more than communicate motion to some inanimate object, as when he fires a gun and hits with a bullet an object at a distance. The blow struck by the bullet is in such a case considered as his act, as much as the pressure of his finger on the trigger.

Sometimes, instead of communicating motion to an inanimate object, he communicates a wish for some motion to an animal; as when he sets a dog to hunt game in a field. Here, also, we consider the hunting of game to be his act.

Or the wish for the motion may be communicated to a human being; as when a tradesman bids his servant deliver goods to a customer. Here, also, the delivery is considered as the tradesman's act.

AGENCY.

When a human being is employed to do an act, he is called an "agent."

When I do an act under the fear of some evil with which I am threatened by some one, not in pursuance of a legal right, and I do it for the purpose of avoiding that evil, I am said to do it under duress. It is also sometimes said that I do the act against my will. To do an act against the will of the doer is, however, impossible; for an act supposes a determination of the will to do the act, and without such determination there can be no act at all. Thus, if, by sheer force, I put a pen into your hand, and trace your name with it, this is not your act done against your will; it is not your act. But if I hold a pistol to your head, and threaten to shoot you unless you sign, the signature is then your act, and follows on a determination of your will just as much as if you had signed under any other inducement. Having before you the choice of two things,—to sign or to be shot,—you choose the less disagreeable alternative.

An act, therefore, done under duress, is as much a man's act as an act done under any other motive. And it is the same in regard to the consequences. When, under duress, I do an act, I may not desire the consequences which follow, but I may know that they are likely. Thus, A. says to B., "unless you kill C., I will kill you." If thereupon B. kills C., B., though he does not desire C.'s death, yet knows that C.'s death is likely just as well as if A. had offered him a bribe to fire a loaded pistol at C., and he had done so.

In these cases, therefore, if the legal result is different, it is not because the attitude of the doer of the act as regards the consequences is different, but because, for reasons which have appeared sufficient, a different legal result has been assigned.

A person may, if he chooses, express an intention which is not really present to his mind. Thus, I may promise to give a man £5 when I do not intend doing so. This is what is called a "mental reservation." Now, it is, I believe, a universal rule to treat the expressed intention as a real intention, just as it is a rule to treat the unmanifested intention as if it had no existence. It is not quite an adequate statement of the matter to say that the mental reservation is disregarded. Not only so, but this is one of the cases in which the same legal result is attributed to a nonexistent intention as would have been attributed to it if it had been an existing one.

Where an intention is expressed under duress, it is very likely not to be a real intention; the party who uses the expression merely pretending that such is his intention. But, according to principle, this should make no difference. If the party expresses an intention to promise, there should be a contract; if to make a testamentary disposition of his property, there should be a will; if to make a conveyance, the ownership should pass,—these results being modified, if necessary.

Another matter which is said to affect the legal result of acts, but in a way and to an extent which it is not always easy to perceive, is ignorance or mistake. Ignorance and mistake are generally classed together, and the considerations applicable to them are the same. If it were necessary to distinguish them, I should say that ignorance is not to know of facts which do exist, and mistake is to suppose facts to exist which do not. But both are cov-

ered by the word "error," and, for the sake of brevity, I shall use that word only.

Of course, when a man acts under the influence of error, he, nevertheless, wills to do that to which his desires lead him. Such phrases, therefore, as "*nulla voluntas errantis*" have no real meaning. Nor do I understand what Blackstone means when he says that in cases of error the will and the deed act separately.⁵

ERROR WHEN WHOLLY IMMATERIAL.

If there is error, then the act which a man wills to do produces consequences other than those which he desired or expected. But, in considering the effect of error upon the legal result of an act, we may get rid of those cases in which the error is immaterial; that is, those cases in which there are other consequences as to which there was no error, and which are sufficient to induce the legal result. For example, a bar of metal belonging to A. is examined by B., who, without asking any questions, comes to the conclusion that it is gold. He thereupon offers to purchase it, and the offer is accepted. The error is immaterial, because there is an intention to buy a specific thing which is alone sufficient to induce the legal result.

ERROR IN CRIMINAL CASES.

The law as to error has, I think, got into some confusion by not bearing in mind what is and what is not material. Thus, a great deal has been made of the distinction between errors of law and of fact, and criminals are often told that when they set up an excuse that they did not know the law, though they may excuse themselves by errors of fact, yet they are presumed to know the law, and therefore that they cannot set up as an excuse an error of law. This sounds very unreasonable, and would be unreasonable if it were true. But, generally speaking, it is not true. The intention to break the law is, in most cases, wholly immaterial. A man is not punished for breaking the law, but for doing an act which is harmful. Where an intention to break the law is an element in the offense, as in most cases of larceny, ignorance of the law can be successfully pleaded.

⁵ Comm. vol. 4, p. 27.

IMPUTATION OF INTENTION OR KNOWLEDGE.

But in some cases, where there are no consequences desired or expected which would induce the legal result, nevertheless the legal result is arrived at by imputing to the doer of the act an intention or knowledge which had no existence. Whether or no this imputation will be made is a matter of law. In some cases it would be made; in others not.

ERROR OF LAW AND OF FACT.

In determining whether or no an intention or knowledge will be imputed when, by reason of error, the intention or knowledge does not exist, I do not think the law pays any attention to whether the error is one of law or one of fact. The whole question of imputing intention or knowledge is a very intricate one, and depends on a variety of considerations, but not on this one. Thus, in criminal cases we hardly ever impute intention or knowledge at all, the direct infliction of punishment being reserved for real, and not for imaginary, offenses. In transactions between man and man we very often do impute intention, but, as I shall show hereafter, only by reason of the assumption that the expressed intention and the real intention necessarily correspond. This, undoubtedly, in many cases, leads to the imputation of an unreal intention, but one of a very special kind. The assumption that the expressed intention and the real intention necessarily agree is justified by our experience that, upon the whole, this assumption is a useful one.⁶ So, also, intention is imputed where there is what is called "malice in law," because in such cases a wrong has been done which the law desires to redress. But, as I have said, in none of these cases is the distinction between errors of law and errors of fact of any importance.

⁶ If I understand him rightly, what Mr. Pollock calls "real common intention" is the intention as it appears from the expressions used. *Contracts* (3d Ed.) p. 426. It was not necessary, perhaps, for him to advert to the possible difference between the expression and the reality, which is, as I have said, practically ignored. But I could not ignore this difference in my endeavor to get at the bottom of the rules of the law upon this difficult subject. * * *

IN WHAT CASES IMPORTANT.

If, therefore, the distinction between errors of law and errors of fact, which has been made a great deal of, is of any importance at all, it must be so in that class of cases in which, the normal legal result having followed notwithstanding the error, there is an attempt made to get rid of that result by the action of the court. That this can be done in one class of cases there is no doubt. Thus, if A. pays money to B. on account of a debt which has already been paid, believing the debt to be still due, the usual legal result of such a transaction follows, namely, that the money becomes the property of B.; but it can be recovered back by A.

In this single class of cases, also, as the law now stands, the distinction between errors of law and errors of fact is of importance, since, if the error is one of law, the money cannot be recovered. Why this should be so I cannot say.

IN COURTS OF CHANCERY.

There is also a peculiar class of cases in which courts of chancery have endeavored to undo what has been done under the influence of error, and to restore the parties to their former position. The courts deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text-books and in the cases there referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not wholly ignored, and it may have had some influence, but it is always mixed up with other considerations, which, not unfrequently, altogether outweigh it.

The distinction between errors of law and errors of fact is therefore probably of much less importance than is commonly supposed. There is some satisfaction in this, because the grounds upon which the distinction is made have never been clearly stated. Blackstone says that the reason of the distinction is because every man not only may know, but is bound to know, the law.⁷ This statement is, how-

⁷ Comm. vol. 4, p. 27.

ever, obviously untrue; and, even if it were true, it would not explain the distinction. Austin, after rejecting Blackstone's explanation, says: "If ignorance of law were admitted as a ground of exception, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible."⁸ Why so? Alleged errors of fact are as difficult to investigate as alleged errors of law. And neither in the Roman law nor in modern continental systems is the distinction drawn between errors of law and errors of fact with the same sharpness as in England.⁹

INFANCY, INSANITY, AND FRAUD.

There are other circumstances which influence the contemplated result of an act, which continental lawyers are in the habit of discussing generally, but which for English lawyers can as yet be hardly disengaged from the particular classes of transaction with which they happen to be connected. As examples, I may mention insanity, infancy, misrepresentation, and fraud. I may, however, point out once for all that it is very rare, indeed, that, on any of these grounds, an act simply fails to produce its contemplated legal result. The matter generally requires a much more delicate adjustment than this, especially where, as is frequently the case, the interest of third persons is concerned.

VOID AND VOIDABLE.

English writers on law generally assume that all the cases in which the legal result of an act is affected by these special circumstances may be covered by saying that the act is "void" or "voidable." But these are words of very uncertain meaning. The word "void," where it is used at all accurately, means, I think, devoid of the legal result contemplated.¹⁰ The word "voidable" means, I suppose, that the result may be made "void" by some one. But the

⁸ Lect. 25 (3d Ed.) p. 498.

⁹ See Dalloz, Rep. s. v. Obligation, art. 142, sqq.; S. v. Peines, art. 369, sqq.; Civ. Code art. 1108, sqq.; Preuss. Allgem. L. R. I. 4, 75; Unger, Syst. d. Osterr. Prac. R. vol. 2, pp. 33, 34; Schwarze, Strafgesetzbuch, § 9; Sav. Syst. d. h. Röm. Rechts, vol. 3, Beyl. 8.

¹⁰ See Pol. Cont. (3d Ed.) p. 7.

questions remain, by whom and by what process? Continental lawyers make a triple division. First they set apart those cases in which the contemplated legal result fails altogether; as, for example, a will of lands made by an infant. Such acts they call "absolutely void." In the next class they place cases in which, as regards some persons, the act fails altogether to produce its contemplated legal result, but, as regards others, the result is produced; as, for example, in the case of a bishop's lease exceeding the period prescribed by the law, which is good as against the bishop, but not as against his successor. These acts they call "relatively void." Then the third class comprises those acts which produce their legal result; but this result can be set aside by the action of some person concerned either with or without restitution; as, for example, a contract induced by fraud. These acts are called "voidable." I think there is some advantage in this triple classification, but it does not carry us far towards attaching a precise meaning to the terms employed; and, in the hot contests that have taken place whether an act is void or absolutely void or voidable, it seems to me that the disputants have frequently used the words in different senses.

RESTITUTION.

It is in connection with cases in which the contemplated legal result has taken effect, but is to be set aside, that we come across the important topic of restitution. There is a large number of cases in which the legal result contemplated will follow, but it can be set aside by a court, not however simply, but upon certain conditions. This is called "restitution," the parties being restored as nearly as possible to their original condition. This is the course which justice most frequently requires, and it was the inability to order restitution that crippled the action of courts of common law in England, and relegated cases of this class, in a great measure, to courts of chancery. But, though courts of chancery have been in the daily habit of making restitution, it is remarkable that this convenient word has not yet found a place in accepted English legal terminology.

RATIFICATION.

From a consideration of the steps which may be taken to invalidate the legal result of an act, we naturally pass to the subject of

ratification. There has been some dispute as to what is meant by this term also. What I understand to be meant by "ratification" is this: After an act has been done which has had its legal result, but which legal result may, by taking the proper steps, be counteracted or modified, if the person who is empowered to take these steps signifies his intention not to take them, or does some act by which he loses his right to take them, he is said to ratify the act in question.

This, I think, is the proper meaning of the word "ratification." The word is, however, sometimes used by English lawyers to express something different from this. Thus, if an agreement be made by B. in the name of A., without A.'s knowledge or authority, and then A. consents to be bound by the agreement, the legal result is the same as if A. had antecedently authorized the making of the agreement; and A., in such a case, is said to ratify the agreement. There are various ways of looking at this matter, which I may discuss hereafter. All I have to say now is that, if this be called "ratification," then we give the same name to two things which are essentially different.

CHAPTER X.

OWNERSHIP.

From Markby's Elements of Law, §§ 307-322, 335.

If we consider any material object, such as a field, a piece of furniture, a sum of money, or a sack of wheat, we shall see that various rights exist with respect to it. There is the right to walk about the field, to till it, to allow others to till it, and so forth; there is the right to use the piece of furniture, to repair it, to break it up, to sell it; there is the right to spend the money, to hoard it, to give it away; there is the right to grind the wheat, to make it into bread, to sow it for next year's crop, and so forth.

All these rights which I have spoken of are rights over the thing available against the world at large,—jura in re and in rem.

If all the rights over a thing were centered in one person, that person would be the owner of the thing, and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centered in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it, and another right to till it. The owner of a piece of furniture has not one right to repair it, and another right to sell it. All the various rights which an owner has over a thing are conceived as merged in one general right of ownership.

A person in whom all the rights over a thing were centered, to the exclusion of every one else, would be called the absolute and exclusive owner. This means that no one has any right over the thing except himself. It does not mean that he may exercise his ownership in accordance with his uncontrolled fancy. In the exercise of all legal rights, whether of ownership or of any other kind, each of us is under a certain control arising out of the relation in which we stand to the ruling power, or to other members of the society to which we belong. I cannot exercise my rights in such a way as to infringe the law or the rights of others. To take an example: I am the absolute and exclusive owner of a large quantity of charcoal, sulphur, and saltpeter. I am still the absolute owner,

although the law forbids me to mix them together and keep them in my house. No one by reason of that restriction has a *jus in re* over them. Nor is my ownership affected. The restriction is on my liberty of action only.

But if I have pledged the saltpeter as security for a loan, then the pledgee has a *jus in re* over it; and my right to dispose of it is restricted, not by a mere restriction on my liberty of action, but because one or more of the rights of ownership have been detached and given to another.

So if I grant a right of way to a neighbor across my land, or if my neighbor has a right to graze his cattle there, he has a *jus in re* over the land, and certain fragments of ownership have been detached and transferred to him.

Absolute and exclusive ownership is rare, and yet I do not think it is possible to explain what is meant by ownership, except by starting with this abstract conception of it. It is to this that we always revert when we are trying to form a conception of ownership.

OWNERSHIP NOT AN AGGREGATE OF RIGHTS.

Ownership, as I have said, is conceived as a single right, and not as an aggregate of rights. To use a homely illustration, it is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. Yet, as we may take a drop or several drops from the bucket, so we may detach a right or several rights from ownership.

The distribution of rights detached from ownership which we actually find in use is very extensive. Thus, it would be no strange thing to find a piece of land, and that A. had a right to till it, B. a right to walk across it, C. a right to draw water from a spring in it, D. a right to turn his cattle on it to graze, E. a right to take tithe on it, F. a right to hold it as security for a debt, and yet no one of these persons would be considered as the owner.

In such a case as this the owner would be stripped nearly bare of his rights, and it may seem, at first sight, purely arbitrary to continue to call such a person the owner. But this is not so. Though his ownership is greatly reduced, he is still in essentially a different position from that of any other person. So long as the rights I have mentioned are in the hands of any other person, they have a separate

existence, but as soon as they get back into the hands of the person from whom they are derived,—as soon as they are “at home,” as it were,—they lose their separate existence, and merge in the general right of ownership. They may be again detached, but by the detachment a new right is created.¹

However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner. An owner might therefore be described as the person in whom the rights over a thing do not exist separately, but are merged in one general right.

Or an owner might be described as the person whose rights over a thing are only limited by the rights which have been detached from it.²

This residuary right, even in its slenderest form, is of great legal importance. It enables the holder of it to assume a position of great advantage in all legal disputes. All (he can say) belongs to me which cannot be shown to belong to any one else. Every one who intermeddles is an intruder, unless he can establish his right to do so. Everybody also must take just what he is entitled to, and no more. The presumption is always in favor of the owner.

Having thus endeavored to explain the conception of ownership, I now advert to an extended use of the word which has given rise to much controversy and to some confusion.

The word “ownership,” and its English equivalent “property,” as well as the corresponding words in other languages, *dominium*, *propriété*, *eigenthum*, besides being used to express that relation of a person to a thing which I have just now endeavored to describe, have been used to describe generally the position of any person who has a right or rights over a thing. Any person having a *jus in re* has been called owner, not indeed of the thing, but of that right. Perhaps this extended use of the term is to be regretted, as tending to confuse the conception of ownership. Nevertheless it exists, and we must master it. Nor can it be denied that between the ownership of a thing and the so-called ownership of a right there is much analogy. Both owners have *jus in re* and *in rem*. Both can deal with the ob-

¹ This I take to be the meaning of the maxim “*nemini res sua servit*,”—a man cannot have a separate *jus in re* over his own property.

² I do not attempt to define ownership.

ject of their right (with the usual limitation) as they please. The ownership of a right as well as the ownership of the original thing can very frequently be divided. Subordinate rights may be again detached from it, and made over to others. Thus, if A. be the owner of a piece of land, and he lets it to B. for a term of years, A. is still the owner, and, as regards him, B. merely has a *jus in re alienâ*. But, as regards other persons than A., B. will be considered as the owner, not of the land, but of the lease; and, if B. then sell his growing crops to C., C. will have a *jus in re alienâ* as regards B., namely, the right to come on to the land and take the crops when they are ripe. And there is this further analogy between the position of A. and B.: that as B.'s detached rights, if they went back to A., would merge in A.'s general right of ownership of the land, so C.'s detached right to take the crops if it went back to B. would merge in B.'s general right of ownership of the lease.

In the view of some jurists, not only is it wrong to speak of the ownership of a *jus in re alienâ*, but it is wrong to speak of the ownership of anything which is not a material object capable of being perceived by the senses. It seems to me a strange thing to speak of a thing as erroneous which is universally done; and especially when, after all, the question is only one of convenience,—how shall we shape our conception of ownership? The Roman lawyers, as a matter of fact, did speak of the ownership of things which had no corporeal existence. They spoke, for example, of the ownership of a usufruct, and they spoke of the ownership of an *haereditas*, both which the authors of the Institutes have been careful to show are incorporeal; and modern legislation has in the clearest manner adopted the view that things which have an ideal existence may be owned. In England this use of the word "ownership" has taken deep root.

Another peculiarity of the English law of ownership arises out of the very strange conflict between common law and equity. To take a simple case: If I give land to you in trust for myself, at common law I cease to be the owner, in equity I continue to be so. How this came about is an inquiry which belongs to the history of English law, and need not be now pursued. It is only noticed here as an idea of "ownership" by which the attempts at simplifying the notions comprised under that term have been eluded. The court of

chancery, had it confined itself to compelling owners of property either to fulfill certain fiduciary relations, such as those of guardian and ward, or to fulfill the wishes of persons from whose bounty they had received the ownership, would have kept within the limits of analogous institutions in other systems of jurisprudence. Had, too, this been done, not only in those cases where there are special reasons for the exercise of good faith, but in all cases alike where the owner of land had accepted the ownership, subject to a condition to exercise his rights for the benefit of some other person, and the ordinary remedies of law were insufficient to compel him to do so, this would have been a stretch, perhaps, of the doctrines of equity, but would have been very likely beneficial, and would have introduced no entirely new principle. But the English court of chancery has done a great deal more than this. It has created an entirely new interest in land; an interest as comprehensive, as general, as beneficial, as transferable, as ownership itself, which is ownership in fact, only the rights of the owner are somewhat clumsily exercised, and so it is frequently called.³

Ames, "*The Nature of Ownership*," 3 *Harv. Law Rev.*, 314-316.

It is customary to speak of one as owner of a thing, although he ceased to possess it for a time, either by his own act, as in the

³ A cestui que trust is frequently spoken of as an equitable owner of the land. This, though a frequent form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the cestui que trust really owns is the obligation of the trustee, for an obligation is as truly the subject-matter of property as any physical res. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence in the one case the owner is said to have a right in rem, and in the other a right in personam. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting upon all mankind not to destroy the property of another is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of this duty is as pure a tort in the one case as in the other. Ames, "*Purchase for Value without Notice*," 1 *Harv. Law Rev.* 9, 10.

case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or at least elliptical, use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For, although they all have the power of present enjoyment, and consequently the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a res, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an "owner," in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law that no title is completely good unless the right of possession be joined with the right of property, which right is then denominated a 'double right' ('jus duplicatum,' or 'droit droit'). And when to this double right the actual possession is also united, there is, according to the expression of Fleta, 'juris et seisinæ conjunctio,' then, and then only, is the title completely legal."⁴

A true property may therefore be shortly defined as possession coupled with unlimited right of possession. If these two elements are vested in different persons, there is a divided ownership. Let us test these results by considering some of the modes by which a perfect title may be acquired by one who has neither, or only one, of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a res nullius does acquire a perfect

⁴ 2 Bl. Comm. 199. See, also, Id. 196: "And, at all events, without such actual possession no title can be completely good."

title, and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession, with the unqualified right of possession, since there is no one in *rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur autre vie* is owner of the residue of the life estate. For no one, during the life of the *cestui que vie*, can legally disturb him.

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes, this is a just expression. But if the transaction be closely scrutinized the physical res is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and co-extensive right of possession, but not the same right that the seller had. What really takes place is this: The seller transfers the res, and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute. * * *

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it as if it were the seller's own, the purchaser gets at law only the *seisin*. The original owner's title (that is, his right to recover the *seisin*) is not otherwise affected by the conveyance, but a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

CHAPTER XI.

POSSESSION.

From Markby's Elements of Law, §§ 352-360, 362-364, 366, 367, 371-373, 382-383, 391-396.

I will now proceed to consider what is the conception of possession in a legal sense, and I will first examine the physical element which, as I have said, lies at the bottom of the conception of possession.

It is very common to say that possession consists in the corporal seizure or apprehension of the thing possessed by the possessor, and that, in all cases where this corporal contact does not exist, there is not a real, but only a fictitious, possession. And there has been derived from this a theory of symbolical possession, which Savigny considers to be not only erroneous, but to the last degree confusing, when we come to deal with practical questions, and which he has taken great pains to combat. The truth is that, though we undoubtedly do possess most of the things with which we are in corporal contact, and though we come into corporal contact at some time or other with most of the things which we possess, corporal contact has nothing whatever to do with the matter. A man walking along the road with a bundle sits down to rest, and places his bundle on the ground, at a short distance from him. No one thinks of doubting that the bundle remains in his exclusive possession, not symbolically or fictitiously, but really and actually, whereas the ground on which he sits, and with which he is therefore in corporal contact is not in his possession at all. So, as Savigny puts it very forcibly, a man is bound hand and foot with cords,—no one thinks of saying that he possesses the cords; it would be just as true to say that the cords possess him.

Corporal contact, therefore, is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like, and of excluding others. If we consider the various modes in which possession is gained and lost, we shall recognize this very clearly.

Take, for instance, first the case of land. A man buys a piece of land. He pays the price, and both parties sign the contract of sale. The buyer goes to take possession. It is not necessary for him to come into physical contact with every part of the land by walking all over it. He enters upon it, and stands there; the seller withdraws, or signifies his assent; and the buyer is at once in full possession. This is on the supposition that the claim to take possession is unopposed. If the seller is there, and disputes the purchaser's right to take possession, however unjustly, or if a third person is there who disputes the right of both, all the walking upon the land in the world, until this opposition is overcome, will not give the buyer possession; and for this reason,—because the physical element which is necessary to put the buyer in possession is not corporal contact, but the physical power of dealing with the land exclusively as his own. In such a case there are but two modes in which he can obtain possession,—either by inducing those who oppose him to yield, or by overcoming their opposition by force.

It is not necessary, in order to obtain possession, that the purchaser should step onto the land at all. If it is near at hand, and the seller points it out to the buyer, and shows that the possession is vacant, and signifies his desire to hand it over to the buyer, whilst the buyer signifies his desire to receive it, enough has been done to transfer the possession. The physical possibility of the buyer dealing with the thing exclusively as his own, which is all that is necessary, exists, whether he thinks proper to use it by stepping onto the land or not.

If we consider what is necessary in order to retain possession, we shall find the same notion more strikingly exemplified. In order to retain possession, it is not necessary that the possessor should remain on, or even near, the land. Possession having been once received, it is not necessary that the physical power of dealing with the land as he pleases should be retained by the possessor at every moment of time. He will continue in possession, if he can reproduce that physical power at any moment he wishes it. A man who leaves his home, and goes to follow his business in a neighboring town, may still retain possession of his family house and property.

An examination into the mode of acquiring the possession of movable things will lead us to the same result. Possession of

movable things can undoubtedly be taken, and very frequently is taken, by placing oneself in corporal contact with them. I can take possession of money by putting it into my pocket; of a coat, by putting it on my back; of a chair, by sitting upon it. But this contact is not necessary. I should take possession of the money just as well if it were laid on the table before me; of the coat, if it were put into my wardrobe; of the chair, if it were placed in my house. In the same way, if I purchase heavy goods lying at a public wharf, I take possession of them by going to them with the seller, and by his there signifying his intention to deliver them, and by my signifying my intention to receive them. So, also, if I buy goods stored in a warehouse, possession is given to me by handing over the keys. So, too, timber is delivered by the buyer marking the logs in the presence of the seller, not because of the corporal contact or prehension which takes place in marking, but because that is the intention of the parties. The marking might take place without any change of possession, as, for instance, if the logs were marked to prevent their being changed, but they were not to be delivered till the price was paid.¹

In all these cases it is a great mistake to suppose that there is anything fictitious or symbolical or constructive in the acquisition of possession. Each case depends on the physical possibility of dealing with the thing as we like, and of excluding others. In all the cases above put, except two, the thing is actually present before us. But in one of these two, namely, that in which we say possession is taken by placing the thing in my house, we only apply to a particular case a well-known principle, which embodies the very idea we are now insisting on, namely, that a man has the actual custody of all that is in his house, by reason of the complete and exclusive dominion which he has over it². The other of these two cases is that in which the keys of the warehouse where the goods are stored are handed over by the seller to the buyer. But there cannot be a more complete way than this of giving to the buyer the power of dealing with the things sold exclusively as his own³.

And as in the case of immovable things, so in the case of movables, when possession of them has once been taken, it may be re-

¹ Sav. Pos. § 16, p. 219.

² Id. § 17, p. 226.

³ Sav. Pos. § 16, p. 223.

tained so long as the power exists of reproducing the physical capacity of dealing with the thing, and of excluding others. Thus, if, after handing over and receiving possession of goods at a public wharf, both buyer and seller go away, the goods remain in possession of the buyer. Not so, however, if the goods are in the warehouse of a private person, unless the owner of the warehouse agrees to give the buyer the use of the warehouse as a place for keeping his goods.

The consideration of the modes in which possession is lost will make the result clearer still. Every act by which our physical control is completely destroyed puts us out of possession. It makes no difference whether the person who does the act himself gains possession thereby, or indeed whether any one does so. Thus, if I take anything belonging to you, and throw it into the sea, you lose possession, though no one gains it. We may also lose possession of a thing, not only by the act of another person in removing it, but simply because, under the circumstances, we cannot any longer exercise that control, as, for instance, if a tiny jewel drops from my hand in passing through a dense forest, or a captured animal of its own accord escapes back into the wild. So, also, if we leave a thing somewhere, but cannot recollect where, and search for it in vain, we have lost possession of it. There is said to be an exception to this where the thing, though it cannot be found, is still in the owner's house, or on his adjoining premises,—as, for instance, if I drop a coin in my garden, and cannot, on searching, find it, it is said that I do not lose possession of it. But there is a reason for this which shows that it is no real exception. Everything in a man's house and in his garden is, on a principle already adverted to, and widely recognized by the law, considered to be in the immediate custody of the owner of the house and garden, by reason of his exclusive control and dominion over them and all persons residing therein.

On the other hand, a man does not lose possession of a thing by leaving it in a place which he knows, and to which he can return. Thus, if I leave my hatchet in a wood, intending to return the next day and continue my work, I retain possession of the hatchet all the time. But if any one else should find it, and should take it away, from that moment I lose possession.

The same general rule applies to the loss of immovables. The possession lasts so long as there is any physical control over them, and ceases when that physical control ceases. I do not lose possession of my house by filling it with my friends and servants, even if I should go away and leave them there. But should they, on my return, refuse me admittance, declining upon some pretext to acknowledge my rights as owner, then, until I have ejected them, I have lost possession.

The physical element, however, forms only one portion of the conception of possession. Besides this, there is what I may call a mental element, without which the physical relation will remain as a mere fact, having no legal consequences, and not in any way² subject to special legal considerations. In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like, and to exclude others, but also the determination to exercise that physical power on our own behalf.

This important feature in the legal conception of possession may be illustrated by the consideration of a simple case. A person has a valuable article of jewelry, which he wishes to send from London to his house in the country; and for that purpose he gives it to his servant, with instructions to take it to his house, and there deliver it to his wife. The servant does not thereby gain possession of the jewelry, nor does the master lose it. True it is that the servant has the physical control over the jewelry; but, if he is obedient to his master's orders, he has no intention of exercising that control upon his own behalf. The master, on the other hand, by delivering the jewelry to his servant, does not for one moment lose possession of it, if his orders be carried out. Through his servant, who is obedient to his orders, he has the physical control which is necessary to possession, and he has also determined to exercise that physical control on his own behalf.

That a person can be in possession of a thing by his representative has never been doubted. But there has not been a complete agreement amongst jurists as to the nature of that possession. It has been frequently treated as a fictitious possession; but against this Savigny argues, and, it appears to me, successfully.

The error of treating possession through a representative as fictional or constructive possession only is a branch of the error noted above, which treats corporal contact as necessary to true possession. All that is necessary to my possession being the power to resume physical control, and the determination to exercise that control on my own behalf, it is clear that I possess the money in the pocket of my servant, or the farm in the hands of my bailiff, just as much as the rings on my finger, or the furniture of the house in which I live.

This, however, presumes a representative who is obedient to my commands. In other words, whilst, in order to constitute possession of a thing through my representative, I must determine to exercise control over it on my own behalf, the representative must also determine to allow me to exercise that control. As soon as my representative determines to assume control on his own behalf, or to submit to the control of another than myself, my possession is gone. If there be any cases in which this rule does not apply, they are exceptions which the law has introduced to obviate the effects of fraud, or for some similar purpose, as in the case already discussed, where some one has intruded upon the property of an absent owner.

Derivative possession is the possession which one person has of the property of another. The physical control of a representative is sometimes called his possession, though, as we have seen, the legal possession in this case is in the principal. But derivative possession is true legal possession; the holder of the thing having the physical control over it, coupled with the determination to exercise that physical control on behalf of himself.

Hence, between the bare detention of a representative, which is not possession in a legal sense at all, and derivative possession, which is true legal possession, though detached from ownership, there can be no confusion. But there are many well-known legal relations in which the transfer to one man of the physical control over the property of another forms an essential feature; and it is frequently a question to be determined, whether or no, subsequently

to this transfer of the physical control, the possession is in the owner through the transferee as his representative, or whether the transferee holds it derivatively on behalf of himself.

QUASI POSSESSION OF INCORPOREAL THINGS.

The term "possession," as we have hitherto explained it, clearly assumes some tangible, existing thing, over which the party in possession may exercise his physical control: but the Roman lawyers extended the idea of possession to abstractions; to things which are not perceptible to the senses; to "incorporeal things," as they are usually called by lawyers.

Possession, in a legal sense, as distinguished from the mere physical control or detention, does not rest upon a notion exclusively applicable to things corporeal. The notion upon which the legal idea of possession rests is that of making the simple exercise of this physical control a subject for legal consideration and protection, apart from ownership. But the simple exercise of any right may, it is obvious, be so considered and protected.

TO WHAT THINGS APPLICABLE.

We must not conclude from this that all that we have said about possession may be applied, without discrimination, to the exercise and enjoyment of any rights whatever. Many of the rules which govern the question of possession are founded on the existence of something which may be seen, felt, and handled, and it is only by a metaphor that these rules can be extended to a right which may be enjoyed. This is an easy metaphor, when confined within certain limits; as, for example, when we speak of a person who enjoys the use of a pathway or a water course running over the land of another as being in possession of the way or of the watercourse. But it would be at the least a bold metaphor to speak of a doctor in large practice as in possession (in a legal sense) of his practice.

The Roman lawyers contented themselves with extending the legal idea of possession to those rights which they denominated "servitudes,"—a class of rights similar to, but more extensive than, that class of rights which we call "easements." And they constructed, for the protection of the enjoyment of rights of this class,

rules closely analogous to those for the protection of the physical control over things corporeal. Modern lawyers have attempted to give to the idea of possession a much wider extension; and this extension, with us, is somewhat indefinite. Thus by statute the possession of an advowson is expressly protected as distinguished from the title to it. So, also, a person collecting tolls has been treated as in legal possession of the right to take tolls: and it has been even suggested that we might treat a person collecting the interest of a debt as in possession of a debt.

Whether or no such an extension of the idea of possession is useful, this is not the place to consider. It is certain that the extension, if made at all, should be made with some circumspection. Care must be taken, in each new application, not only that the nature of the subject is such that the idea of possession is capable of being analogically applied to it, but also that it is one to which the legal consequences of possession are suitable. To apply those consequences to the exercise of all rights, without discrimination, would produce the greatest confusion.

To whatever extent the idea of possession has been carried, the discussion of it has remained within the limits assigned by the Roman lawyers, namely, the possession of things corporeal, and of servitudes. All, therefore, that we can say further on this subject, must be in connection with the latter class of rights, which we shall hereafter consider.

CHAPTER XII.

CONTRACT—QUASI CONTRACT—TORT.

From Markby's Elements of Law, §§ 604-622, 626-628.

In endeavoring to discover what is meant by "contract," I shall make use of the inquiry into the meaning of the term contained in Savigny's System of Modern Roman Law,¹ of which the following is a paraphrase.

"The idea of contract," says Savigny, "is familiar to all,—even to those who are strangers to the science of law. But with lawyers it is so frequently brought into play, and is so indispensable, by reason of the frequency with which they have to apply it, that one might expect from them an unusually clear and precise conception of it. But in this we are not a little disappointed.

"I will try," he says, "to show what a contract is, by the analysis of a case which no one can doubt is one of true contract. If, then, with this view, we consider the contract of sale, the first thing that strikes us is several persons in presence of each other. In this particular case, as in most, there are precisely two persons; but frequently, as in a contract of partnership, the number is quite uncertain, so that we must adhere to plurality in this general and indeterminate form, as a characteristic of contract. These several persons must all have come to some determination, and to the same determination; for, so long as there is any indetermination, or want of agreement, there can be no contract. This agreement must also be disclosed,—that is, the wishes of each must be stated by, and to each, until all are known; for a resolution which has been simply taken and not disclosed will not serve as the basis of contract.

"Moreover, we must not neglect to observe the object which is aimed at. If two men were to agree to assist each other reciprocally, by example or advice, in the pursuit of virtue, science, or art, it would be a very odd use of the term to call this a contract. The difference between such cases and the contract of sale, which we have selected as the type, is this: In the latter the object which the par-

¹ Section 140.

ties have in view is a legal relation, whereas in the former the objects are of quite another kind. But simply to say that the object which the parties to a contract have in view is a legal relation, does not go to the root of the distinction. When the judges of a court of law after a long discussion agree upon a decree, we have every one of the characteristics hitherto noted, and it is a legal relation that the decision has in view, but yet there is no contract. The bottom of the distinction is that the judges have before them a legal relation to which they are no parties. In the case of a contract of sale, the legal relation which the parties contemplate is their own.

"These characteristics may be summed up in the following definition: A contract is the concurrence of several persons in a declaration of intention, whereby their legal relations are determined."

It will be observed that this definition of "contract" includes, not only those agreements which are a promise to do or to forbear from some future act, but those also which are carried out simultaneously with the intention of the parties being declared. English writers are not very clear upon this point. While, on the one hand, they would seem, in practice, to treat as contracts only those agreements which bind us to do or to forbear at some future time, yet we find, on the other hand, that in their definitions of "contract" they generally take the widest possible ground, rejecting all the limitations suggested by Savigny, and making, in fact, the two words "contract" and "agreement" synonymous.

From some expressions in passages subsequent to that which I have quoted, I gather that Savigny intended to treat the performance of a contract as itself a contract. Thus, if I rightly understand him, he says that the agreement for the sale and purchase of a house is one contract, and the consequent delivery of possession by the vendor to the purchaser is another. This, with deference to so great an authority, I venture to doubt. I think there is here a confusion, which is exceedingly common, between contract and transfer or conveyance, such as Austin has several times pointed out in the course of his lectures.

Subject to this modification (and for our present purpose it is not an important one), I think Savigny's analysis of contract may safely be adopted. * * *

No doubt, if we adopt Savigny's conception of contract, we shall

find cases where all the conditions named by him are present, and where, nevertheless, contractual liability is denied. And we shall also find cases where some of these conditions are not present, where contractual liability is affirmed. It is a practical question whether we shall, on this account, endeavor to reform our conception of contract so as to meet these cases, or treat them as exceptional cases, in which a contractual liability is created, though in reality no contract exists.³

To show what I mean when I say that, though the conditions of contract are satisfied, there is no contractual liability, I may suppose A. to ask B. to take charge of his property, and to distribute it amongst his creditors, and that B. assents, and takes charge of the property accordingly, but afterwards applies it to another purpose. The conditions laid down by Savigny for the presence of a contract between A. and B. are here satisfied, and there is a breach of that contract by B. Nevertheless, B. is not considered to be contractually liable. We put such cases into a separate group, which we call "breaches of trust."

On the other hand, if A. were to ask B. to take charge of all the goods which he might send to B., and sell them to the best advantage, remitting the proceeds to A., if B. were not duly to account for the proceeds he would be liable to A. contractually. This shows how closely the two groups approach each other. Indeed, it shows more,—it shows that they overlap.

English lawyers have not made any very distinct attempt to define authoritatively either "contract" or "contractual liability." Several writers have recently given us a very careful analysis and explanation of "agreement," and this is, no doubt, a very useful step in understanding the nature of a contract; but we have still to inquire, what is a contract? for it is clear that every agreement is not so.

Some persons, after having defined an agreement, go on to tell us that a contract is an agreement "enforceable" at law. This, however, really means no more than that there is a kind of agreement

³ If we could find a definition of "contract" which would save us from the necessity of calling things contracts which were not contracts, it would be convenient. But this has not been done. I have more hope of reforming legal language by finding some more appropriate name for the liability which is now called contractual, but which is really not so.

which it is the legal duty of a party to perform, and that if he does not perform it he may be sued in a court of law, for that is what I understand to be meant by "enforceable." Before we know what is and what is not a contract, and what is and what is not contractual liability, this explanation must be supplemented either by a complete enumeration of cases in which an agreement is so enforceable, or by some general statement of such cases, with an enumeration of exceptions. The latter is what is commonly attempted. It is said that all agreements will be "enforced" (that is, all agreements are contracts) unless the contrary is stated. This accurately describes the general attitude of modern law in relation to agreements, which adopts the principle, "*Pacta sunt servanda*." I have, however, never seen an enumeration of exceptions which was complete; and without this enumeration the difficulty of defining "contract," and of separating off the group of cases in which there is contractual liability, is only avoided, and not solved.

Why the liability of a trustee should not be considered a contractual liability is a question to which I do not find any very clear answer. The best answer I can give is that, though the duty comes into existence upon the consent of the parties, the nature of the duty is not under their control, and the remedy is not the same as on a breach of contract.

The conception of contract as set forth by Savigny does not solve all the difficulties about contract, but it appears to me to have this advantage: that it calls attention to a point which English lawyers have rather lost sight of. It reminds us that the agreement, in order to become a contract, must be one in which the parties contemplate the creation of a legal relation between themselves.

That there are agreements which will be considered not to be contracts, because this legal relation is not contemplated, is, I think, abundantly clear. Suppose, for example, that two friends, A. and B., agree to walk together at a definite time and in a definite direction; no one would say that this is a contract, and yet it is clearly an agreement. The reason, and the only reason, why it is not a contract, is, as far as I am aware, that the parties, presumably, do not contemplate a legal relation. But I doubt whether such a reason has ever been given by any English lawyer.

Another advantage of Savigny's definition of "contract" is that it

clearly describes the true relation of the parties, and how it arises. It arises because there has been between the parties a transaction having reference to their legal rights, for which we have no special name, but which the Germans call "rechtsgeschäft," and the French call "acte juridique." And the relation which is created is, I think, better described generally as a legal relation than as that of an enforceable agreement, which appears to mean an agreement upon which an action can be brought.⁴ But I should be disposed to say (which Savigny may very likely have meant) that the legal relation contemplated must be that of two persons having the one a definite claim against the other.

A contract is a manifestation of intention, and the same difficulty arises in contract, as in all other manifestations of intention, when we have, in cases of dispute, to ascertain what the intention really was. We can only infer intention from acts, and whether we make this inference by the aid of artificial rules, or without them, we shall inevitably, in some cases, attribute intention wrongly. This is a difficulty which is inherent in all inquiries into disputed facts. In acts of which the very object is manifestation of intention, if the parties are careful, the difficulty is not, under ordinary circumstances, very great. But from the slovenly mode in which parties to a contract, in the hurry of business, or from carelessness, frequently express themselves, great difficulties often arise in ascertaining what legal relation the parties intended to create. It is with reference to this inquiry that it is said, "The intention of the parties governs the contract." But the difficulty of ascertaining the intention still remains. The person to whom the promise is made (or "promisee," as he is called) may say that he expected one thing, and the promisor may say that he intended another. In which sense is the promise to be taken? * * *

The practical solution of the difficulty is, I think, simple enough. Austin rightly points out that there is a distinction between the intention of the parties and the sense of the promise; and it is the sense of the promise, rather than the intention of the parties, which governs the contract. Of course, the sense of the promise

⁴ It does not seem that those who define "contract" as an enforceable agreement would have any name for an agreement which produced legal results, but not the legal result of being enforceable by action.

may be different to different persons. The promisor may consider that his words bear one sense, the promisee may consider that they bear another, and a stranger may consider that they bear a third. But the judge, who has to decide what legal obligation has resulted from the transaction, determines what the sense is. And in doing this he may fairly use the assertions of the parties themselves as a guide to his own conclusion. Having first ascertained the terms in which the parties expressed themselves, he may hear what each party says as to their true interpretation, and what each, respectively, says he intended by them. He may also consider what interpretation would be put upon them by an uninterested man of ordinary understanding. He may even go further, and consider the surrounding circumstances, so far as they throw light upon either the sense of the promise, or the intention of the promisor, or the expectation of the promisee. But after all he must put upon the words his own interpretation, and from the sense which he attaches to the words he must presume the intention. So that the current phrase, "the intention of the parties governs the contract," is really only true to this extent: that it governs the contract, where both parties are agreed what the intention was. Where there is a dispute as to the intention, the contract, or rather the contractual liability, is governed by the intention, as it is presumed from that sense which, under all the circumstances, the judge thinks ought fairly to be attached to the promise.

* * * The English law says that there is no liability upon a contract, unless the contract fulfills one of two conditions, namely, either that it is made upon a "consideration," or that it is contained in a deed under seal.

A contract, we are told, is made upon "consideration" when some thing is done, forbore, suffered, or undertaken by one party at the request of another, which is made the foundation of the promise of that other.

This rule about consideration is not recognized by any other system of law in the modern or ancient world. It is only recognized in England, and in those countries which have derived it from England. * * *

From Holland's Elements of Jurisprudence, 213, 214.

The right which, looked at from the point of view of the Law which imposes it, is described as an obligation, is described, from the point of view of the person of inherence, as a 'ius in personam.' The difference between a right of this kind and of the kind discussed in the preceding chapter is obvious enough.

When a man owns an estate, a general duty is laid upon all the world to refrain from trespassing on his land. If he contracts with a landscape gardener to keep his grounds in order for so much a year, then the gardener owes to the landowner a special duty, over and above the duty owed to him by all the world besides. If a surgeon is practising in a town, while there is a duty incumbent on all not to intimidate patients from resorting to him, or otherwise molest him in the exercise of his profession, there is no general duty not to compete for his practice. Any one may legally establish a rival surgery next door. Suppose, however, that the surgeon has bought his business from a predecessor, who, in consideration of being well paid, has covenanted not to practice within twenty miles of the town in question. Here the predecessor, beyond and above the duties owed by others to his successor, owes him the special duty of not competing with him by the exercise of his profession in the neighbourhood. In the cases supposed, the landowner and the practising surgeon have respectively rights 'in personam,' against the gardener and the retired surgeon, over and above the rights 'in rem' which they enjoy as against every one else.

Most frequently antecedent rights 'in personam' arise, as in the above cases, out of the agreement of the parties. They are however often due to some cause with which the parties have nothing to do. In these cases, although the person of incidence has not undertaken a special duty to the person of inherence, yet the Law casts that duty upon him, as if he had so undertaken it. There is a ligeance between two individuals, although the chain that binds them was not linked by their own hands. Every one has, for instance, a right that public ministerial officers, such as sheriffs, registrars, or postmen, shall exercise their functions for his benefit when occasions arise entitling him to their services. Similar rights 'in personam' are enjoyed against per-

sons filling certain private fiduciary positions, such as trustees, executors, administrators, and trustees of bankrupts. So also against persons who happen to enter into certain transitory relations with others, such as persons to whom money has been paid by mistake, or whose affairs have been managed by a 'negotiorum gestor.' Finally, against persons who occupy certain family relationships to others, e. g. against wives and children, and vice versa against husbands and parents.

Antecedent rights 'in personam' are divisible, according to the investitive fact to which they owe their origin, into two great classes. Such rights either arise or do not arise out of a contract. In the former case they are described as rights 'ex contractu.' In the latter case, since they arise from facts of various kinds to which it pleases the Law to affix similar results, we shall describe them as rights 'ex lege'.

From Holland's Elements of Jurisprudence, 226.

The State lends its force to assure the performance of those promises of which it thinks fit to take cognisance. This it endeavours to do by putting some sort of pressure upon the will of the promisor, which it therefore indubitably so far subjected to the will of the promisee. The fact that the pressure thus applied may often fail of its effect has given rise to an ingenious inversion of the theory of contract. According to Mr. Justice Holmes, a contract may be regarded as 'the taking of a risk.' 'The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.' But, as the able advocate of this view is compelled to admit, 'when people make contracts they usually contemplate the performance rather than the breach'; nor can it be seriously maintained that the performance of a contract is more optional than that of any other legal duty. Libel or assault, equally with breach of contract, are possible to any one who is prepared to be answerable in damages for the indulgence of a taste for defamation or violence.

From Amos' The Science of Law, 215-220.

The word "contract" has habitually been applied, in all countries, to a number of legal transactions, which, on one ground or another, in no way satisfy the description of a true legal contract as given above. Such, for instance, are "quasi contracts," which only resemble contracts in respect of the legal situation of the parties when once the situation they depict has been attained.

There are cases in which a person, through a series of accidental circumstances, may be in possession of what belongs to another, or may have parted with what belongs to himself on grounds which he afterwards discovers to be insufficient. He has committed no injury to a right of ownership, or has so far sustained none. But it is clearly inequitable that he should retain what does not belong to him, or be unable to recover what does. He clearly is liable to a special duty, as towards the owner of what he possesses, or has a special legal right against the person who possesses what belongs to himself. He has a duty to restore, or a right to enforce restoration. Or he may be in both positions at once, and then he is situated exactly in the same way as if he had made a pair of contracts, or a single two-sided, or so-called "bilateral," contract. The rights and duties really belong to the law of ownership, and should be treated under that head; but their similarity to the obligatory relations arising out of a contract have, in many systems of law, led to their being affiliated to contract law, and being treated under that head. The English expression, "implied contracts," seems to cover assumed or fictitious engagements of this nature, and also to cover unmistakable contracts when the evidence for them has to be gathered from a number of surrounding circumstances, rather than from the express language of the parties.

There are some important transactions to which the term "contract" is frequently applied, although they can in no way be said to satisfy the description of a legal contract as above given. Such, for instance, are marriage and sale. It is customary to speak, not only of a contract to marry, which is an unmistakable legal contract, but of the act of marriage, or assemblage of acts which constitute a marriage, as being a contract. There is undoubtedly an analogy between the situation of two persons who marry one another, and that of two persons who make a contract with each other,

and this analogy may be closer in some countries and periods than in others. Indeed, the analogy may be so close in the case of some marriage laws that the difference between a marriage and a contract vanishes altogether.

The analogy consists in (1) the necessary reciprocity of sentiment and intention which accompanies the joint act; (2) the result of the joint act, which is that each of the parties has legal rights and duties in respect of the other; (3) the character and extent of some of these rights, which frequently may be qualified by the joint will of the parties, as ascertained on the occasion of entering upon the marriage.

But this analogy is only an analogy, and no more, because the rights and duties of the parties are primarily fixed by the state; and such qualifications of those rights and duties by the parties themselves as the state allows—as, with respect to property, management of business, education of children, and the like—are treated as wholly subsidiary to the general policy of the state in respect to the rights themselves.

Again, in all states in which unrestricted liberty of divorce is not allowed, no mere agreement by the parties themselves can cancel the marriage, whereas it is of the very essence of a contract that either contractor can release the other from his duties to perform the contract. Thus, though it is true that law often, in respect to certain matters, limits the region of free contract, and to that extent modifies the conception of contract altogether, yet in these cases persons are only restrained as to the matters to which the contract shall not extend. Whether or not it shall extend to all matters legally permissible is left to the free will of the parties.

But in marriage, as also in service, in some states of society,—and not so long ago in England,—all the main rights and duties resulting from the relationship (and which are the expression of it) are sharply marked out both by positive and negative limits. The practical reliance (so far as the relationship is regarded from its legal and not its moral side) of each of the parties is placed, not on the good faith of the other leading him or her to do what has been promised, but on the presumed willingness of the other to conform to the course arbitrarily marked out for him or her by law.

It is obvious from this investigation, as has been already indicated,

that marriage has a tendency to glide into a mere contract, and that the prevailing distinction between marriage and a contract must be tested by the amount of voluntariness permitted in constituting the terms of the relationship and the conditions of its duration. The formation and preservation of the family group is, however, in any healthy state, of far too great moment to be relegated to the capricious choice of individual persons in the community. On this ground, marriage is an act by which a status, or special legal relationship sanctioned by the state, is entered upon, and not a mere contract made.

It is even a more inveterate habit to speak of a "contract of sale" than of a "contract of marriage," and yet the transaction termed a "sale" is still less analogous to a true contract than marriage is. A sale is in itself nothing more than an exchange or mutual conveyance of property between two persons, the property (or a part of it) conveyed on one side being the common circulating medium of the country; that is, money.

All that is essential to a sale is that the parties should intend to effect it, and should in form effect it. When two parties make a mutual interchange of money for goods, and intend that one shall represent the price or the reason for thus surrendering the other, all the necessary elements of a sale are completely present. In very primitive times, before the notion of contract, or even of good faith, has acquired any steadiness, no other sort of sale than this exists. The exact character of it is typified in the Roman solemnity of *mancipatio*, in which the notion of mutual conveyances was the only one present. In modern purchases in what is called "market overt," the same notion is alone to be found; and, there being no engagement reaching to the future, there is no room for the operation of contract.

But by a series of steps, some of the earlier of which have been skillfully tracked out by Sir H. S. Maine, the notion of contract becomes naturally imported into the more primitive and elementary notion of sale. First, the custom becomes habitual of one party conveying what belongs to him, while the other party abstains for a time from performing his reciprocal function; and, next, the custom becomes habitual of neither party making any conveyance at the time, but only of agreeing to make conveyances in the future. In

this last case a contract for a future sale has taken the place for the moment of an actual sale; but the contract for a sale is not a substitute for a sale which must take place afterwards, unless, as happens under some legal systems, courts of justice impart to certain contracts for a sale all the legal character and incidents of an actual sale.

The relation of a contract to a conveyance, and, more especially, of a contract for a sale to an actual sale, is perplexed by certain peculiarities in the transaction styled a "sale," to which the habits and convenience of mankind have given birth.

Thus, the case may be supposed that a sale has been made of the general kind recognized and supported by law, and yet that neither party has complied with the formalities (whatever they happen to be) which in every case are indispensable to the legal conveyance of the property or money.

Here the law occupies a somewhat ambiguous position. On the one hand, it asserts that the parties have conveyed that which, by the appropriate act, they signified their purpose to convey. On the other hand, the law asserts they have neither of them conveyed that which, without the forms appropriate in each case, could not be conveyed. It is from a sort of instinctive resistance to this ambiguity of attitude that the notion of sale itself slowly undergoes a metamorphosis. It acquires a double meaning—First, the simple and original one of mutual and reciprocal conveyance; secondly, the derivative meaning of a contract, the terms of which are that each party shall, in default of immediate conveyance, take such steps as may be needed to make an effectual conveyance at a future time.

In this way, by an extensive use of the term "sale," the legal ambiguity above described is cured. The law no longer asserts that a sale means only simultaneous acts of mutual conveyance. It means this, but it also means contracts to convey in default of immediate conveyance.

Another source of complication in the relationship of contract to sale is that in the case of most sales a number of subsidiary contracts are usually either expressly made by the parties, or implied by law; such legal implication being based on the ordinary habits of mankind, on general convenience, or on particular customs preva-

lent in respect of certain classes of transactions. Such are contracts with respect to rescission of the sale, or to compensation, in case of hidden defects, known or not known to the seller, coming afterwards to light; with respect to the possession of the thing sold, either before or after the actual conveyance has taken place; with respect to the responsibilities of the possessor for injuries to it sustained during the possession; with respect to giving compensation in case of eviction; and possibly, as in the case of an English common-law mortgage, with respect to resale hereafter on certain conditions being complied with by the seller.

The number of surrounding contracts which thus hang round all the most important sales naturally lead to the suppression of the notion of the sale itself as independent of these contracts. This is the more likely to be the case where, as in England, the same deed of conveyance commonly operates at once as transferring the property, and as furnishing evidence of, or rather as constituting, a series of subsidiary contracts.

From Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. Law Rev. 55-58.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties.

Absolute rights are of two kinds or classes: First, those rights of property which constitute ownership or dominion as distinguished from rights in the property of another,—*jura in re aliena*; secondly, personal rights, i. e. those rights which belong to every person as such.

Relative rights, as well as their correlative duties, are called "obligations," i. e. we have but one word for both the right and its correlative duty. The creation of every obligation, therefore, is the creation of both a right and a duty; the right being vested in the obligee, and the duty being imposed upon the obligor. Undoubtedly, the word "obligation" properly expressed the duty, and the use of the same word to express the right is a defect of nomenclature which is unfortunate, as it has given rise to much confusion of ideas. Obligations are either personal or real, according as the duty is imposed on a person or a thing. An obligation may be imposed upon

a person either by his own act, namely, by a contract, or by act of law.⁵ Obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another,—*jura in re aliena*. Instances of real obligations will be found in servitude or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res pignorat* or *hypothecated* to secure the payment of a debt was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of “pawn” or “pledge.” The *hypotheca* has been rejected by our common law,⁶ though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law; the very words “lien” and “obligation” having the same meaning, and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance.⁷

Relative rights differ from absolute rights in this: that the former

⁵ Strictly, every obligation is created by ~~this~~ ^{the} law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation.

Strictly, also, a tort gives rise to an obligation as much as a contract, namely, an obligation to repair the tort, or to make entire satisfaction for it; but this is an obligation which the law imposes upon a tortfeasor merely by way of giving a remedy for the tort. In the same way, the breach of a contract gives rise to a new obligation to repair, or make satisfaction for, the breach.

⁶ It would, however, be more correct to say that our law does not permit the owner of property to hypothecate it at his own will and pleasure; for hypothecations created by law do not exist with us, as will presently be seen.

⁷ Such a lien is an hypothecation created by law. It is what civilians call a “general hypothecation,” because it attaches to all the land of the judgment debtor or recognizor, whether then owned by him, or afterwards acquired.

Instances of hypothecations of goods created by law will be found in the lien given to the landlord on the goods of his tenant to secure the payment of rent, and in the lien on beasts damage feasant given to the person injured to secure satisfaction for the injury done. These liens are enforced by distress. The former is in a sense general, i. e. it attaches on all the goods which are on the demised premises when the rent becomes due.

add nothing to the sum or aggregate of human rights; for what an obligation confers upon the obligee is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights.

Every violation of a right is either a tort, or a breach of obligation. Every violation of an absolute right is therefore a tort. So is every violation of a right arising from an obligation (i. e. of a relative right), which does not consist of a breach of the obligation. Hence every act committed by any person in violation of a right created by a real obligation is a tort, for such an act cannot be a breach of the obligation.

Whether a right created by a personal obligation can be violated by an act which constitutes a tort, i. e. by an act which does not consist of a breach of the obligation, is a question involved in much doubt and difficulty. In *Lumley v. Gye* * and in *Bowen v. Hall* * this question was decided broadly in the affirmative; for it was held in each of these cases that it was a tort maliciously to procure an obligor to break his obligation. In each of them, however, the court was divided. In *Lumley v. Gye* there was a very powerful dissenting opinion, which was fully adopted by one of the judges in *Bowen v. Hall*; and, though the writer is not at present prepared to say that the decisions were wrong, yet neither is he prepared to admit that they are right.

An obligation may, however, be so framed as to make it possible for the obligor or a third person to destroy the obligation before the time for its performance arrives. For example, if the performance of an obligation be made conditional upon the happening of an event which is subject to human control, any act which prevents the happening of that event will destroy the obligation; and there could be no doubt that such an act, if done for the purpose of destroying the obligation, will constitute a tort. Nor does the writer see any reason to doubt that it would also be a tort maliciously to procure another person to destroy an obligation, even though the person committing the act of destruction were the obligor.

For most practical purposes, however, it may be said with sufficient correctness that a right created by a personal obligation is sub-

ject to violation only by a breach of the obligation, and hence only by the obligor; for it will very seldom happen that any question will arise as to the violation of such a right by any person other than the obligor, or in any way other than by a breach of the obligation.

From Amos' The Science of Law, 220-223.

There is one common notion with respect to contract which yet remains to be examined; that is, the notion of contracts being transferred in life, or on death descending by intestate succession or testamentary disposition. As above explained, a legal contract was seen to be eminently a personal agreement; that is to say, an agreement in which the promisor relied upon his own ability and disposition to keep his promise, and the promisee relied upon the same likewise. In pursuance of this essential conception, it must seem wholly anomalous to admit of any substitution of persons in the course of carrying out the contract; and yet the rapid play of commerce depends more upon what may be called the "marketable value" of contracts than, perhaps, upon any other single legal institution. What is needed, then, is to understand what is meant by a contract being bought or sold, or descending to heirs and executors.

At this point the inconvenience is experienced in English law of having no word at hand like "obligatio"—signifying the legal relations created by a contract—to oppose to the contract itself, out of which the legal relation arises. In Roman and in Continental law, through the use of the term "obligatio," there is no danger of confusing the rights and duties which it denotes with the formal act which is the cause and sign of their having accrued. But it is quite customary in England to hear of contracts descending to a man's heirs or executors, and of their being assigned and bought or sold. What is really meant is that the rights and duties which have attached through the making of a contract are the subjects of the several legal operations indicated.

There are, indeed, cases in which it may be difficult to distinguish whether a person doing a certain act with the help of another person's name, and possibly by the use of documents signed by him, is simply (1) succeeding to the rights and duties of the other, arising out of his contract with a third person; or (2) making a fresh con-

tract for himself; or (3) merely personating the original contractor, and by such temporary intervention assisting the actual contractor to avail himself of rights under the contract.

The first of these cases is that of those contracts, the benefit or burden of which descends to a man's heirs or successors, or of those which, in the words of English law, "run with the land"; that is, which attach to every one into whose hands a certain piece of land comes, whether it be as landlord or as tenant. Whether the rights and duties under a contract shall descend and pass from one person to another in these or in any other ways must depend, as do all other qualifications of these rights and duties, upon the will of the contractor, subject, of course, to the recognition of such consequences on the part of the state. The convenience is so great of a man's being able to bind, not only himself, but also all those who inherit his estate, and of a man's being able to rely on the performance of an engagement, not only by the individual person who binds himself, but (if its object be yet unaccomplished at the time of that person's death) by those who succeed him and inherit his means of completing the performance, that the notion of succession to obligations—or to the rights and duties arising out of contracts—becomes a most familiar one in all systems of law, and the process of such succession is usually facilitated as much as possible by legislation.

In the second case above alluded to, a person might seem to be only availing himself of the contract of another when really he is also or solely making a new contract for himself. This is the case of the contracts made by what are called "negotiable instruments," to which class of contracts belong those arising out of bills of exchange and promissory notes. These instruments are simple written forms conveying a promise to pay money to any possessor of the instrument at a certain date; the money either to be paid directly by the promisor, or indirectly through a third person, in whose hands the promisor has deposited money for the purpose of satisfying the demand. The essence of these instruments is that, by the mere transfer of the document, accompanied, it may be, with the affixing to it of the transferrer's name, a new set of rights and duties are called into being, exactly reproducing the original ones created between the original promisor and promisee; and yet all the while

the original promisor, and each intermediate one, continue bound to the actual possessor of the document. This process may be repeated any number of times. The peculiarity, however, is that, since each transfer of the document creates a fresh contract, all the successive contracts co-exist at the same time.

The real explanation of this is that each promisor in turn lays himself under a contingent duty to pay a certain sum of money to the person who holds the document, and presents it at the proper time and place. He makes no contract with any one but the person to whom he immediately transfers the document, but the nature of the contract so made is such that any future holder of the document has all the rights arising under the contract which any previous contractor had. Thus, each promisor is liable to pay the debt once to some person or other. * * *

Ames. Inalienability of Choses in Action, 3 Harv. Law Rev. 337-341.

The rule that a chose in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not assign his reversion, nor a remainder-man his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the res or its value. In a word, no right of action, whether a right in rem or a right in personam, whether arising ex contractu or ex delicto, was assignable, either by act of the party, or by operation of law.

A right of action for the recovery of lands or chattels, or of a debt, which, like lands or chattels, was regarded as a specific res, did, indeed, descend to one's representative in the case of death. This was hardly a departure from the rule, since the representative was looked upon as a continuation of the persona of the deceased.

There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a chose in action. * * * Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assignees, could ~~not~~ be enforced by a transferee. If, for instance, one granted an annuity to A. and his assigns, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A.

and his assigns, the assignee was allowed to bring an action in his own name against the grantor, covenantor, and warrantor, respectively.

The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that this rule has its origin in the decision of the "sages and founders of our law," to the "multiplying of contentions and suits,"¹⁰ shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence.¹¹ The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.

A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort; that is to say, a chose in action always presupposes a personal relation between two individuals. But a personal relation, in the very nature of things, cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by the consent of the parties to such transfer, the relation between the transferrer and the thing may be destroyed, and replaced by a new but similar relation between the transferee and the res. But where one has a mere right against another there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may, of course, be extinguished and replaced by a new and co-extensive duty of B. to C. But this substitution of duties can be accomplished only in two ways,—either by the consent of B., or, without his consent, by an act of sovereignty. The

¹⁰ *Lampet's Case*, 10 Coke, 48a.

¹¹ "But in regard to choses in action, as the same doctrine has been adopted in every state of Europe, it may be doubted whether the reason which has been the foundation of the rule everywhere else was not also the reason for its introduction in this country, namely, that, the credit being the personal right of the creditor, the debtor, being obliged towards that person, could not, by a transfer of the credit, which was not an act of his, become obliged towards another." 2 Spence, *Eq. Jur.* 850. See, also, *Pol. Cont.* (5th Ed.) 206; *Holmes, Com. Law*, 340, 341; *Maitland*, 2 *L. Q. Rev.* 495.

exceptions already mentioned, of assignments by or to the king, * * * are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's choses in action, and in St. 4 & 5 Anne, c. 16, which abolished the necessity of attornment.

Where the substitution of duties is by consent, the consent may be given either after the duty arises, or contemporaneously with its creation. In the former case the substitution is known as a "novation," unless the duty relates to land in the possession of a tenant, in which case it is called an "attornment." A consent contemporaneous with the creation of the duty is given whenever an obligation is by its terms made to run in favor of the obligee and his assigns, or in the case of annuities, covenants, and warranties, before mentioned, or to owner or bearer, as in the case of bills and notes and other negotiable securities. Here, too, on the occasion of each successive transfer, there is a novation by virtue of the obligor's consent given in advance; the duty to the transferrer is extinguished, and a new duty is created in favor of the transferee.

The practice of attornment prevailed from time immemorial, but was confined to the transfer of reversions and remainders. Novation, although now a familiar doctrine, was, if we except the case of obligations running to the obligee and his assigns, altogether unknown before the days of assumpsit upon mutual promises. The field for the substitution of duties by consent was therefore extremely limited, and in the great majority of cases a creditor would have found it impossible to give another the benefit of his claim, had not the ingenuity of our ancestors devised another expedient, namely the letter of attorney. By such a letter, the owner of a claim appointed the intended transferee as his attorney, with power to enforce the claim in the appointor's name, but to retain whatever he might recover for his own benefit. In this way the practical advantage of a transfer was secured, without any sacrifice of the principle of the inalienability of choses in action.¹³

¹³ In 1 Lil. Abr. 125, it is said: "A statute merchant or staple, or bond, etc., cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R." See, also, *Deering v. Carrington*.

Indeed, so effectual was the power of attorney as a transfer, that, during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferror. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the fifteenth century, if not earlier, till near the close of the seventeenth century.¹⁴

The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property.¹⁵

By statute, in many jurisdictions, the assignee may even sue in his own name. But it is important to bear in mind that the assignee, under the statute, still proceeds, in a certain sense, as the representative of the assignor. The statute of itself works no novation. It introduces only a change of procedure.¹⁶

ton, 1 Lil. Abr. 124; Shep. Touch. (6th Ed.) 240; 2 Bl. Comm. 442; Leake, Cont. (2d Ed.) 1183; Gerard v. Lewis, L. R. 2 C. P. 308, 309, per Willes, J. These letters of attorney for the attorney's own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiquity. (1309) Riley, Memorial of London, 68. "Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings, with the arrears, and by distress the same to levy in my name, * * * and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person." See, also, West, Symb. 521.

¹⁴ The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of choses in action, and the notion became current that no contracts were assignable, not even covenants or policies of insurance, and the like, although expressly payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants. Warranties, being obviously not open to the objection of maintenance, continued assignable, and so did annuities, although not without question. Perk. Conv. 101.

¹⁵ Formerly an express power of attorney was indispensable (Mallory v. Lane, Cro. Jac. 342), the notion of an implied power being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise (2 Harv. Law Rev. 53, 58). To-day, of course, the power will be implied from circumstantial evidence.

¹⁶ Accordingly, an assignment in New York, where, by statute, actions must

be brought by the real party in interest, will not enable the assignee to sue in Massachusetts, where the old rule that an assignee must sue in the assignor's name still prevails. *Leach v. Greene*, 116 Mass. 534; *Glenn v. Busey*, 5 Mackey, 233. If the statute truly effected a change of title, the assignee, like the indorsee of a bill, could sue in his own name anywhere.

